United States Court of Appeals
for the Second Circuit

APPENDIX

77-7037

In The

United States Court of Appeals

For The Second Circuit

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NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

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UNITED STATES COURT OF APPEALS
FILED
AUG 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX - VOLUME 6

CARL E. PERSON
Attorney for Plaintiffs-Appellants
132 Nassau Street
New York, New York 10038

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
Attorneys for Defendants-Appellees James M. Roche, Frederic G. Donner, General Motors Corp. and General Motors Acceptance Corp.
345 Park Avenue
New York, New York 10022

HETZELT, WATSON, McGARVEY & HETZELT
Attorneys for Defendants-Appellees Hamister-Gillogly Chevrolet, Inc. and Niagara Frontier Automobile Dealers Association, Inc.
1904 Liberty Bank Building
Buffalo, New York 14202

JOSEPH C. TISDALL
Attorney for Defendant-Appellee Bob Bain Chevrolet
300 Statler Office Building
Buffalo, New York 14202

BRENNAN, CALLAHAN, TESSEYMAN,
ZELMAN, RUNFOLA & NOBLE
Attorneys for Defendant-Appellee Paul Batt Buick, Inc.
1360 Statler Hilton Hotel
Buffalo, New York 14202

SIDNEY A. WEISBERG
Attorney for Defendant-Appellee Paragon Oldsmobile, Inc.
225 Broadway
New York, New York 10007

BORINS & SNITZER
Attorneys for Defendant-Appellee Glen Campbell Chev., Inc.
1718 Statler Hilton Hotel
Buffalo, New York 14202

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ro begin with. I think the evidence could conceivably be stretched to the point of arguing that Strimple and Bolling agreed to operate together, but there is no evidence that Bolling assigned any claims he might have had from any matters arising prior to the formation of General Auto Sales and, therefore, General Auto Sales has not succeeded to any such claims.

But beyond that I think it will become clear that nothing happened to Multi-Make for which any damages might be recovered in this case. I don't think we need to be too concerned about that.

Now, the second thing I want to say in setting the broad pattern of this thing is that with the exception of the testimony relating to Paul Batt Buick, we deal exclusively with claims that one or another Chevrolet dealers reacted in one or another way to a proposal made in October of 1967 that they sell over some undefined period of time, which differs depending on the dealer, 200 or 400 new Chevrolets to General Auto Sales for $25 to $50 over invoice price.

With the possible exception of the seven orders that it is claimed were given to Kem Dengler Chevrolet on the occasion when the two to four-hundred car proposal was discussed, there is no claim that

General Auto Sales ordered any specific cars in Buffalo and had those orders refused, or ordered any cars, and then found the orders were not filled.

THE COURT: You are saying that the only dvidence of the presentation of specific orders at this time was the Kem Dengler?

MR. KAPLAN: That is correct.

THE COURT: There is no evidence of specific presentation to a Gillogly Chevrolet?

MR. KAPLAN: I believe that is right, your Honor. I will come to that in due course, because I will discuss each dealer individually, but to give your Honor the fullest answer, I believe the only other testimony is that when Strimple and Bolling went to Laks Chevrolet Bolling said there was no discussion of specific orders.

Strimple said there was a discussion of some of the seven orders; that he gave some information concerning specifics to Laks. But that he did not in fact order the automobiles or give the orders to Laks at that time. But I will come back to that.

THE COURT: Are you saying the evidence as to the 200 to 400-car proposal that this was for Chevrolets only?

MR. KAPLAN: We are dealing only with Chevrolets, with the exception of the Paul Batt Buick thing which is a separate problem.

THE COURT: Is there evidence that he went to Paul Batt and asked for two to four hundred Buicks?

MR. KAPLAN: I will have to check that. I think there is, frankly.

3 THE COURT: Also the offer was for $25 to $50 over invoice.

MR. KAPLAN: It is also conceded by plaintiffs that their offer was made at the start of the model year and Mr. Strimple from his experience knew that cars were sometimes scarce at the start of the model year. Mr. Bolling also conceded that he was aware of the Chevrolet fleet rebate plans, and both Strimple and Bolling conceded facts which made it clear that General Auto Sales was not eligible for rebates and Mr. Strimple also made it clear that he didn't give the dealers, I think I am quoting, any more information than they needed. This was in the context of having asked whether he told them he was reselling when giving a proposal for 200 to 400 cars, which cars admittedly were at a cut price in circumstances where the plaintiffs concededly didnt disclose, at least in full, what they were going to do with the cars.

Let me go dealer by dealer because that is the only way to treat the Buffalo situation. I will start with the only two known Chevrolet dealers we are concerned with because I think they are very easily disposed of.

First as to Paul Batt Buick, the proof as to Paul Batt Buick is that on December 5, 1967, General Auto Sales --

THE COURT: Could someone at your table look and see if there was any request of Paul Batt Buick for the proposal of 200 to 400 cars? You can go ahead.

MR. KAPLAN: The evidence is that on December 5, 1967, General Auto Sales ordered a 1968 Buick Electra.

On December 5, 1967, Mr. Strimple claims that General ordered a 1968 Buick Electra from Paul Batt Buick. The testimony is that some time in January, I believe the 22nd or thereabouts, Rolling and Strimple became aware that the car was at Paul Batt Buick. I don't think it is important how they became aware of it, they saw it there and the claim is that they knew it was for them for a variety of reasons, and we are not going to dispute that for the purpose of this motion.

The claim then is they went back the next day to pick it up and the sales manager at Paul Batt

Buick told them the car wasn't there, it had been repurchased by the zone, and Mr. Strimple concedes that the reason given was because there was a malfunction in the vehicle or because the zone wanted to check it for a malfunction in the vehicle.

On or about the same day that this took place Strimple testified that he reordered the same car from Paul Batt Buick and that it was delivered on February 22, 1968. From that point onwards General Auto Sales ordered cars from Paul Batt Buick, and got cars from Paul Batt, and there was no further problem whatsoever with Batt.

Now, as far as this one automobile is concerned, first of all, there is no evidence whatsoever in this record that that car was taken back by the zone for any reason other than that given by Collins, the sales manager.

THE COURT: Except, I think, there is testimony that it is a very unusual thing to happen.

MR. KAPLAN: That is it, that is absolutely it.

Your Honor, I would invite your attention to the fact that at the time the National Traffic & Highway Safety Act, 15 U.S.C., Section 1400, provided that if a manufacturer became aware that a vehicle which it produced didn't meet Federal Highway Safety standards, it has a statutory obligation to repurchase the vehicle from the dealer.

I think that there is absolutely no way in the world that anyone could infer that this vehicle was not delivered on January whatever, 1968, because of any conspiracy. Not only is there no evidence that that is so, but any such suggestion would be completely shattered by the fact that Batt reordered and got at the same day and continued thereafter to sell with no further difficulty at all, and I just don't see any point in going any further.

One other comment is that Mr. Bolling admitted that the district managers from Chevrolet would have no contact with Buick dealers in the ordinary course of things, and therefore if there were problems with Chevrolets, there is not only no basis for assuming they infected the Buick dealers, but there is an admission which supports the contrary proposition by plaintiffs.

The only evidence we have found about Paul Batt Buick and this 200-car proposal is at 2457 of the transcript where Mr. Strimple said that some time in the Winter of 1967 he talked to Batt about the number of cars he was projecting on purchasing and talked about possibly delivering used cars turned in on trade-in by train to Mr. Britt in North Carolina. That is about it.

(Continued on next page.)

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THE COURT: All right.

MR. KAPLAN: Unless your Honor has some question about Batt Buick --

THE COURT: I have no question about that.

MR. KAPLAN: We have next Jack Stevens Buick, and there the testimony by Mr. Strimple on direct was that he had some conversation with Mr. Jackson of Stevens Buick inthis late '67, early '68 period about getting cars, and Jackson said he was not interested and made reference to a "rash of brokers."

On direct Strimple said Jackson pulled out the BADA Bulletin, Plaintiffs' Exhibit 310, but on cross he admitted that was not so, that he thought the conversation was on the phone and he had jumped to the conclusion that Jackson had the BADA Bulletin by virtue of the existence, in both Jackson's statement and in the bulletin, of the phrase "rash of brokers."

Putting that aside, there is no evidence whatever that theer was any conspiracy between General Motors and Stevens Buick.

THE COURT: This is not a situation where there was a request for the 200 to 400 cars. Was there any proposal made?

MR. KAPLAN: I don't believe there was.

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Jackson said no when he called up. He said he was not interested in selling to him.

I will get the reference, your Honor.

(Pause)

MR. KAPLAN: Strimple said "I was trying to buy a Buick from Mr. Stevens Buick."

THE COURT: Is this dated?

MR. KAPLAN: Between October or September of '67 to the beginning of '68, and I'm at page 2495.

THE COURT: The dates again?

MR. KAPLAN: September '67 to the beginning of '68.

THE COURT: I understand.

And then this response which you have described.

MR. KAPLAN: And the context was not the 200-car proposal. Strimple said "I was trying to buy a Buick from Mr. Stevens Buick and he said he was not interested in selling cars to the brokers and pulled out this bulletin," and then on cross he changed that slightly, he changed it only as to the pulling out of the bulletin. That's at 2565, I believe.

THE COURT: All right.

MR. KAPLAN: I'll take care of some of the

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shorter ones first. The Chevrolet dealers: We have Glen Campbell Cheveolet, which is a defendant in this case. The testimony on Glen Campbell Chevrolet is that Strimple walked in and they said no and that's it. I am referring to page 2498 of the transcript.

THE COURT: Let's get that.

MR. KAPLAN: This was between September and December of 1967. Strimple claims he spoke to a man by the name of Tony Pierri about getting automobiles. I think elsewhere he said all of the Chevrolet problems were 200 to 400 cars, so I think we can assume that. He was asked:

"Q What did you say to him and what did he say to you?

"A I asked him if he would sell us cars and got his refusal, that he could not deal with us."

THE COURT: Just a second.

(Pause)

MR. KAPLAN: So once again I see absolutely no basis for an inference that there was any conspiracy between this dealer, Glen Campbell, and General Motors.

Among other things that I would point out is that in this case Mr. Strimple's testimony

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appears to be that he walked in and got an instant refusal. There was not even an opportunity for this fellow Pierri, according to Strimple's testimony, to talk to another soul.

THE COURT: Unless he was prepared.

MR. KAPLAN: Unless he was prepared, and there is no evidence of that.

THE COURT: It seems to me that the problem in the Buffalo situation is this: If you got a bulletin of the association in September indicating disfavor with Nabcor, and if it was circulated to a lot of dealers, then if you got any participation at all by General Motors with even one dealer, can't you have a conspiracy?

Let me put it this way: If General Motors conspired with one dealer, that would be enough to constitute a conspiracy. Then if other dealers joined they are joining the conspiracy. They may not communicate with General Motors, they may not even know about General Motors' participation with the one dealer. Or, you could start at theother end: If the dealers got together and conspired, or some of the, you would have a conspiracy, and General Motors might join by talking to one dealer, and other people might join.

The point I'm making is that I don't think the plaintiffs, to win their case, would require proof of a communication by General Motors with Glen Campbell, with Kem Dengler, and all these people.

MR. KAPLAN: I understand your point and I'll go directly to it because it really is the heart of the case as far as Buffalo is concerned, and before I even get to the heart there are two points that need to be made:

The first of the points is that even assuming the sort of conspiracy your Honor is talking about relating to the bulletin, Dengler is not part of it because Dengler is 85 miles from Buffalo and it's stipulated on this record that he did not receive the bulletin.

THE COURT: He could have talked.

MR. KAPLAN: But there is no evidence of that and there is no evidence that the bulletin was sent to him; so we have a special problem --

THE COURT: You are saying there is no evidence he talked to other dealers?

MR. KAPLAN: That's right. Not a word.

Nor is there evidence that he ever saw the bulletin. So that's point one. Dengler is a special case. I'll deal with that separately but Dengler

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is a special case.

The second point that has to be made is that while I think your Honor's statement of the law of conspiracy as it applies to the Buffalo situation is absolutely right, there is an awful lot subsumed by the phrase "joined the conspiracy," whether you are talking about General Motors joining a dealers conspiracy or a dealer joining a conspiracy between General Motors and another dealer or dealers, because joining a conspiracy -- and I think the case will bear me out in this -- involves a conscious adherence to an illegal scheme, and I think there would need to be some evidence on that point.

I'm going to deal now with dealers separately and the question of what GM did, but I want to start with thatpoint so it not be slighted over by me inadvertently.

I would like to talk about the question of the bulletin and the relation to GM. I had not planned to take it up here but as long as you raised it I think it is the heart of the case in Buffalo.

THE COURT: That's Exhibit 310?

MR. KAPLAN: Yes, your Honor.

There is precisely one scrap of evidence in this case that connects that bulletin to General Motors in any way and that scrtp of evidence is Plaintiffs' Exhibit 339, Mr. DiSimone's memorandum of January 5, 1968 to Mr. Olson.

THE COURT: I think I better get copies of that before me.

Can I have copies of 310 and 339?

MR. PERSON: I have the originals here.

THE COURT: Thank you.

MR. KAPLAN: Assume for purposes of this part of my argument it would be enough for the jury to infer conspiracy among the dealers if there were refusals to deal after this bulletin went out to the dealers, Plaintiffs' Exhibit 310. I don't think that is so, but it's an assumption you have to make for GM to even become involved. What is the evidence that GM consciously adhered to such a hypothetical dealer conspiracy based on the bulletiin? The evidence is this paragraph in Plaintiffs' Exhibit 339 that Mr. Womack gave to his district managers a copy of the bulletin so that they would be familiar with the subject in the event dealers made reference to it; that Mr. DiSimone told him in substance that that was a pretty dumb thing to do because some district manager might do something wrong with it.

Mr. Womack responded that in his view the district managers had not done anything wrong with it, but that he would bring up the matter again and make certain that nothing was done with it of an improper nature.

In order to hold GM responsible for a conspiracy among Chevrolet dealers in Buffalo in this time period, you have to make a number of leaps from the information contained in Plaintiffs' Exhibit 339.

First of all you have to assume, with absolutely not basis to support it, that when Mr. Womack passed out this bulletin to his district managers he made some suggestion or in some way indicated that he approved of what it is that the bulletin may have been advocating, that is, taking action to do something about Nabcor. There is not any evidence that that is so, none whatever.

Mr.Person has produced not a shred of testimony in depositions or at trial as to what if anything Womack said when he passed this thing out, and for all this record knows Womack passed out this bulletin, and as English said at the preliminary hearing --

THE COURT: I don't want to get into the preliminary hearing. We have to be careful.

MR. KAPLAN: For all we know on this record, Womack passed out the bulletin and said "Now, gentlemen, you know there are antitrust laws in this country and you can't cross the line, and I want you to know what may be going on."

THE COURT: We do not know what Womack said in passing it out.

MR. KAPLAN: That's right.

In order to reach a conclusion that there was consious adherence by GM to a conspiracy we have to know what, if anything, Womack said, and there is no evidence, and the only way you could reach any conclusion on that is to take a guess, and antitrust liability, in my judgment, is not founded on guesses.

There is a second thing you have to know because even if you assume that Womack passed out the bulletin and said "Gentlemen, I want you to see to it that none ofyour dealers sell to Nabcor," you have to find out that somebody in fact did something about it. There is not any evidence of that either.

With the exception of the English episode, which I will come to in a minute and which is not in this record as far as General Motors is concerned, there is no evidence that a single General Motors employee said a word to a dealer on the subject of Nabcor, except that there was some correspondence between Clements Gillogly and the Chevrolet zone which resulted in Mr. Strimple getting fleet allowances to which he was not really entitled.

So I think it's fair to say that you cannot jump from Plaintiffs' Exhibit 339 to a conspiracy. I submit it would not be a permissible inference for a jury to draw. There are too many holes. There is no evidence that Womack adopted the position of the dealers association. There is no evidence that he said anything to his people about it, and there is no evidence that his people did anything about it. There is just nothing to connect the zone office to anything the dealers did other than surmise.

Let me come back to the dealers. In that context, this flat refusal by Campbell Chevrolet does not give rise to any possible inference or conspiracy. There is no evidence that Campbell talked to anybody from Chevrolet about it, and there is no way to tie Campbell to any other conspiracy that could possibly involve General Motors.

Then we have the plaintiffs' testimony about Dave Hallman Chevrolet. Dave Hallman Chevrolet is an episode which has little to do with any conspiracy in Buffalo. What is the evidence on Hallman? It's that Strimple went and made his proposal and they quoted him a price that was higher than he wanted to pay.

THE COURT: What was that price?

MR. KAPLAN: They initially told him $125 over invoice and subsequently told him $250 over invoice. But Mr. Strimple admitted on cross-examination, 2599, that Hallman Chevrolet never refused to sell to him. The problem was he didn't want to pay $250 over invoice.

So I think that takes care of Hallman Chevrolet. Iven if you assume there was a conspiracy in Buffalo, Hallman was not a part of it.

I'll come to Laks Chevrolet. This is one of the dealers where there is a lotof testimony about the 200 car proposal. The evidence is that Strimple and Bolling went into one of the Laks dealerships, saw a group of the Messrs. Laks and talked about buying a lot of cars and srop shipping them, I think the phase is, "all over."

Mr. Bolling testified that no agreement was reached on that occasion to buy any automobiles. He testified thathe did not, and Mr. Strimple did not, give Laks the seven specific orders that the plaintiffs were carrying around in their pockets when they went to these dealers in Buffalo.

Strimple did say, as I mentioned before, that he mentioned some of the specifics or the specifications about some of these orders, but he didn't do anything about it. He didn't order them from Laks.

A day or two later the plaintiffs -- I keep saying the plaintiffs, but I refer to Strimple and Bolling -- learned from Laks that Laks was not interested, and what was the reason? At page 2560 and 61 we read into evidence Mr. Strimple's interrogatory answers in which he quotes Mr. Laks as saying that he was not interested in selling to Nabcor because he would be in competition with us. Not much of a conspiracy there either.

I'm sure Mr. Person is going to make a great deal tomorrow of the fact that in the same interrogatory answer Strimple said that on the prior occasion one of the Laks had indicated that they were going to check with the Buffalo zone before making an absolute commitment, and then the next day he said they were not interested because Nabcor was going to be in competition with them.

There is not any direct evidence, of course, that they did check with the Buffalo zone, but suppose they did, and suppose you draw the inference that they learned in talking to the zone that Nabcor was going to be reselling in Buffalo and was going to be in competition -- I should refer to General Auto Sales and I don't mean Nabcor.

So what? What kind of communication is perfectly appropriate. There is nothing conspiratorial about that. Mr. Strimple's testimony makes it abundantly clear that he was deliberately concealing, at least in this period, whatthe nature of his business was. With respect to Laks he told them that the cars were going all over the place, or something like that. He said that he didn't specifically tell them he was going to resell in Buffalo.

If Laks found out from GM or somebody else that Strimple was being less than completely candid, there is no evidence he made a decision on anything but the information and no evidence of any conspiracy.

In the first place, Laks had not agreed to sell to them at all. That's the plaintiffs' own testimony.

As far as Bain Chevrolet is concerned, this is a case where there is a lot oftestimony about what Bain supposedly said to Mr. Striomple and Mr. Maiorana, but all of this testimony was received against Bain and not against General Motors, and I think that your Honor is not entitled to consider those alleged statements by Bain in dealing with the General Motors motion for a directed verdict.

THE COURT: Frank Maiorana testified as to what Bain told him?

MR. KAPLAN: The story is that Strimple went into Bain and said he wanted to place a purchase order for 200 or 400 cars and Bain said "How are you going to pay for it?" And Strimple said "My friends Frank Maiorana or Nabcor" --

THE COURT: Strimple talked to Bain and then Strimple talked to Maiorana?

MR. KAPLAN: And then Maiorana telephoned Bain.

THECOURT: I don't think Mr. Maiorana testified about it.

MR. KAPLAN: Page 302 to 306 in the transcript.

THE COURT: What is that testimony?

MR. KAPLAN: In the first conversation Bain and Maiorana discussed how it was that Nabcor was going to pay for the 200 or 400 cars and Mr. Maiorana said he told Bain he would send a Nabcor check for the 200 or 400 cars and that Bain said that that was perfectly acceptable to him, and then the next day Strimple claims to have talked to Bain and Bain said no, he talked to the zone or manager regarding that and then Strimple called back Mr. Maiorana and Mr. Maiorana called Bain and at that time Bain supposedly told Mr. Maiorana that the zone told him not to sell to Strimple.

But as I say, all of that testimony was received only against Bain and not against General Motors and on this motion it is not properly before the Court.

As far as the admissible testimony relating to Bain and General Motors, it is that Strimple went into Bain one day and said that he wanted to buy 200 or 400 cars; that he thereafter had a conversation on the phone with Mr. Maiorana, and Mr. Maiorana had a conversation with Bain; that Strimple had a conversation with Bain;

that Mr. Maiorana had a conversation with Bain; and that Strimple never got any cars from Bain. That is the admissible evidence against General Motors as to Bain.

Based on that, plus the fact that starting in December of 1968 Bain Chevrolet sold to Strimple, I would submit that there is no evidence of a conspiracy between Bain and General Motors.

It is also worth noting --

THE COURT: Beginning when?

MR. KAPLAN: December of '68. There is an order in '69. I think you have the delivery date but I think it was ordered in December.

THE COURT: Yes, all right.

MR. KAPLAN: We also have the testimony by depositon of Mr. Arnold, who was a salesman who worked for Bain and he allegedly was present at one of these conversations when Strimple was in Bain's dealership and all he had to say on the subject was that Strimple talked to Bain about buying cars and Bain said no.

And that subsequently Bain at a sales meeting, and I believe this testimony was not received against General Motors, if I am not mistaken, Bain subsequently at a sales meeting said he was not going to set Strimple up as a competitor and that he was angry about it or something and said he was either going to call the zone or other Chevrolet dealers.

I don't think that's anything against General Motors. It came in under a limiting instruction. That's the proof as to Bain Chevrolet. As I say there is no evidence of any contact between Bain and General Motors, no evidence of any contact between Bain and anyone else, at least as far as GM is concerned, and I don't think you can find a conspiracy there either.

I think that leaves me only with Gillogly Chevrolet which certainly has the most facts to deal with.

We have,as far as Gillogly Chevrolet is concerned, two stories, Bolling's and Strimple's, and they are by no means entirely consistent.

I will start with Bolling. And most of Bolling, of course, is not admitted against General Motors. It is admitted only against Gillogly because pretty much all Bolling had to say about Gillogly was that he claimed Mr. English told him.

The story of Gillogly Cheveolet and Bolling starts sometime before the 6th of October 1967 because Bolling testified that all these events took place before he and Bolling bought the master distributor contract which is fixed at October 6.

He said that he went into the conference room at the Gillogly dealership and talked to Messrs. Holstead and Hamister and at some point Mr. English joined the meeting. He testified unequivocally that Holstead and Hamister did not on that occasion, whether before or after English came in, agree to take any orders at all. He testified unequivocally that he did not on that occasion even mention the orders he was carrying around in his pocket presumably.

English comes into the meeting. The conversation with English,as I say, is not admissible against GM.

Then Bolling's testimony is that he left and that neither Hamister or Holstead said anything to him after English supposedly made the remarks which Bolling has testified to.

We also have this claim about the meeting in the restaurant, the encounter in the restaurant a couple of weeks later. Once again the comments attributed to English have not b-en admitted against

General Motors.

Bolling testified that he had no further business contact with Gillogly or English and made no further effort to get any automobiles there.

As far as Bolling's story is concerned, your Honor, I would suggest that the most you have is some talk. There was neither a request to sell cars, because he never got that far, according to the testimony, before English walked in, nor was there a refusal.

For all Bolling knew, even after English left Holstead and Hamister might have said,"We would be delighted to do business with you." There is no testimony that he even asked. The only evidence is the circumstantial evidence that starting not very long after this encounter Gillogly Chevrolet started selling cars to General Auto Sales and in fact became its biggest source of automobiles in Buffalo.

That's on Defendants' Exhibit E, and the first one was ordered January 30, 1968.

To jump ahead a little bit, we also have the fact that according to Strimple starting in late '67 the people at Gillogly Chevrolet tried to get him a fleet certificate. We have the documentary evidence --

THE COURT: A little slower.

MR. KAPLAN: Strimple testified that starting in late 1967 Mr. Holstead and Mr. O'Donnell at Gillogly Chevrolet tried to get him a fleet certificate. That's at page 2525 of the record.

THE COURT: Who tried?

MR. KAPLAN: Holstead and O'Donnell, both of whom worked for Gillogly Chevrolet. That's at page 2525.

THE COURT: Could we break off for just a minute. I have a criminal matter.

(Recess)

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MR. KAPLAN: If I remember correctly, the point I had reached was the point that Bolling on the occasion he claims to have encountered English at Gillogly Chevrolet never even got to try to ask whether he could get cars, and that he had no further contact with him, there was no refusal, and the subsequent evidence from Mr. Strimple is that in late 1967 the Gillogly people tried to get him a fleet certificate and, of course, we have the facts established in the documents and by Mr. Strimple's testimony that in the middle of 1968 the Gillogly people helped him apply for a fleet allowance from Chevrolet, and he got those fleet allowances which were approved by Mr. Womack, the fellow whom you have to assume is the architect of any Chevrolet conspiracy in Buffalo if you are going to make that kind of assumption at all, because he is the fellow in Plaintiffs' 339 --

THE COURT: Womack knew what Nabcor was. It wasn't a matter of Womack thinking Nabcor was some leasing company. There was some conversation with Womack about late 1967.

MR. KAPLAN: I think it is fair to say this, however, the bulletin, BADA Bulletin, Plaintiffs' Exhibit 310, which describes Nabcor, referred neither

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to Strimple nor to General Auto Sales.

THE COURT: And the application for the fleet allowance was for General?

MR. KAPLAN: Yes. It is therefore conceivable,I suppose, that Womack didn't know, although not terribly likely, but if you reach that conclusion, I think you also have to reach the conclusion that when Strimple went around to people saying, "I am General Auto Sales," they couldn't connect him to the Bulletin either.

So I think you have to assume that Womack knew. The whole Buffalo case doesn't make any sense at all unless you make that assumption.

Furthermore, I think we have Strimple's testimony that the people at Gillogly surely knew, page 2620, he told them somewhat later down the road, late in 1967, nonetheless he told the Gillogly people he was buying for resale.

But I started this in the context of discussing the Bolling-English encounter because I was dealing with Bolling, and I would just make one more point about that, which I think is relevant before going into Strimple, and that is this:

Bolling and Strimple are both clear that this

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encounter with English at Gillogly Chevrolet antedated the master broker agreement, October 6. Therefore, it antedated the formation of General Auto Sales. It involved only Bolling, not Strimple, and I would submit to your Honor that if there is any claim against anybody arising out of the English encounter at Gillogly Chevrolet, it is not the claim of General Auto Sales or Mr. Strimple, it is the claim of Mr. Bolling and Mr. Bolling is not a plaintiff in this action.

THE COURT: How do you do that?

MR. KAPLAN: There is no General Auto Sales, there just wasn't. The corporation wasn't formed until the end of October.

THE COURT: There was a claim about what, about the English --

MR. KAPLAN: There was a claim, and I don't think there is any support in the record for it, but if there is a claim there was no damage caused by the refusal of Gillogly to sell on the occasion when this English encounter took place, that is refusal to sell to Bolling, not any of the plaintiffs in this case.

But, as I said a few minutes ago, the evidence here doesn't support the view.

THE COURT: I think that is a much narrower view than the plaintiffs take. They just think, they take the statement by English and there are problems about admissiblity, but they claim that this statement by English is simply evidence along with other evidence of a broad conspiracy that didn't just take place before October 6 but continued thereafter at least for a little while.

MR. KAPLAN: Perhaps so, but one point I think about that, and that is that there is evidence I think in the record that district managers called on particular dealers, and there is no evidence in this record that English was somebody who called on anybody else. So you can't even tie English to any of the other dealers in this case, and there was no attempt, certainly no unsuccessful attempt, to get cars by anyone after the English conversation.

Let me pass that and let me come to Strimple's account of the relationship or dealings with Gillogly Chevrolet, and it is a very confusing account, as I am sure your Honor remembers.

The first thing that happened when Mr. Strimple was on the stand was that he said that some time before he became a master broker he went to Gillogly to get a source of supply and the only thing he remembered about

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it was being refused. He said that at page 2417.

Now, a few minutes later his recollection began to get a lot fuller and he remembered at page 2421 that on that occasion he had spoken to Mr. Holstead on the telephone and it is worth noting that the testimony I am talking about he began to give on the morning of November 16. He spoke to Holstead on the telephone, his conversation with Holstead was not admitted against General Motors, but he said several contradictory things about that conversation.

He said, first of all, that he was anticipating buying a big volume of cars and Holstead responded that he didn't want to sell. That was the first answer, page 2423.

Then three pages later in the course of recounting this conversation again, he said that Holstead said he would check with the zone, or something to that effect, and that was not admitted as against General Motors, but I note it is not consistent with the statement that Holdstead told me he didn't want to sell, at least raising a question.

Then we broke for lunch on the 16th, and when we came back Mr. Strimple was asked for the third time what happened in the conversation with Holstead, and this time he remembered that Holstead supposedly told him that English had told Holstead not to sell or something to that effect. That is page 2434.

THE COURT: He said what?

MR. KAPLAN: He said that Holstead told him in that telephone call that English had told Holstead not to sell. Strimple so testified at page 2434. That I might add is not consistent with theclaim of a few moments earlier before lunch by Mr. Strimple that Holstead told him he would check with the zone.

But we didn't stop there either.

THE COURT: Pre-lunch is that Holstead said to Strimple to check with the zone?

MR. KAPLAN: No, there are two pre-lunch versions -- really three.

Pre-lunch version No. 1 is that Strimple remembered nothing except that he was refused.

2 Pre-lunch version No. 2 is that Holstead said he didn't want to sell.

Pre-lunch version No. 3 was that Holstead said that he, Holstead, would check with the zone. Then we broke for lunch.

After lunch version No. 1 is that Holstead said to Strimple that English told Holstead not to sell.

On the next page in describing what Holstead told him, Strimple said that Holstead said that he was not interested in selling to Strimple, and I quote, "in this particular way." That is page 2435, which I would suggest isn't consistent with any of the other versions.

Then we broke for the evening. On the 17th, the following day, Mr. Strimple came in and corrected his testimony about this call with Holstead again, and said that when he spoke to Holstead at the end of October or the month of October, 1967, he didn't think Holstead mentioned English at all, but that he thought that he had on some other occasion.

Now, that is the 4th or 5th or whatever version that Strimple gave of that one telephone conversation he claims to have had with Holstead. But that is only the start.

Because Mr. Strimple went on to say that he was introduced to Holstead the first time by Mr. Hennessey, the fellow with Econo-Car, some time in late 1967. This is page 2516 and following - late 1967 or perhaps 1968, and that Hennessey asked Holstead to give Mr. Strimple the courtesy of the house or whatever, and that that was the entire discussion he had with Holstead on that

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occasion.

That he from that point on got cars from Gillogly Chevrolet and Holstead about that time told Strimple he would try to get him a fleet certificate.

I went into this at some length because I think the only fair way to read that testimony is that Strimple has backed off the claim that Gillogly ever refused to sell. All of these versions of Strimple's first contact with Holstead, and by the time we got finished with it after two days, it was that Hennessey introduced him and Holstead got him the cars.

THE COURT: Well, couldn't a jury infer that there were two stages to this? There was some conversation at an earlier point and that the substance of that conversation was one of the six versions or a combination and then, at some later point, Hennessey takes Strimple around and, yes, introduces him, but that is not completely inconsistent with some earlier conversation consisting of some phase of the six versions.

MR. KAPLAN: All right, I am not sure that the record is susceptible of that. I want to read it a little more closely, but let's make that assumption. If I am incorrect in making that assumption, I will tell your Honor in the morning.

Let's assume that. Then all we have at least from the evidence of the record against General Motors is that Strimple was turned down at some time in the Fall of 1967, and I might add that related to the 200 to 400-car proposal because on cross Strimple said, page 2600, that the only problem he ever had related to this 200 to 400-car proposal.

Then we have the fact that as he says in late 1967, he starts getting whatever he wants from Gillogly, a fact which is really borne out by Defendants' Exhibit E.

THE COURT: I don't want to cut you off, but the Buffalo situation was the subject of a lot of evidence, and I am sure we have all given it a lot of thought.

It does seem to me that if there were nothing to this case except a claim about the Fall of 1966 in Buffalo and the request for commitments for 200 to 400 cars, let's just isolate that and let us also assume that there was evidence of actual injury and damage as a result of the failure to make those commitments, or the failure of somebody to make a commitment.

Let us suppose that at that time Mr. Strimple was prepared to immediately take 100 or 125 cars, and he

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couldn't get them because nobody would sell them.

Now, I don't know, despite what you say, it might be that I would hold there was enough of a case to get to a jury on that assumption, although, of course, I would have to think about your analysis and see what Mr. Person says.

But it does seem to me that you don't have something which is pretty crucial, you don't have evidence of Strimple having a need for those cars, Strimple or Bolling or General, and indeed you don't have any indication that at any time they could have used that volume of cars.

MR. KAPLAN: I am coming to that.

THE COURT: I don't know quite how to deal with it, but it seems to me this is just something where -- I don't know what it caused.

MR. KAPLAN: Fine, your Honor, I will come to that in a minute, because I think that one thing we can agree on, even if we don't agree on the result, is that Buffalo may be a hair closer on the question whether there was a conspiracy than anything else close to this case.

I don't think it should go to the jury and there are only one or two more points I want to make on that.

The first point is when we were discussing Plaintiffs' Exhibit 339 in connection with the question of Womack's action relating to the bulletin, there was one point I did make. I said we didn't have any evidence at all as to what Womack said or did about the bulletin, and I was wrong about that.

Plaintiffs' Exhibit 339 says on its face something that gives rise to some evidence on that. It says that Womack told Di Simone in this conversation that he was of the opinion that his district managers had not misapplied the information and further, that he was going to make sure of it.

Thereafter the only evidence in this record about what if anything was done in connection with Womack passing out the bulletin is that it was innocuous, whatever it was. It was in compliance with the law, there is no evidence to the contrary. That is one of my points.

A second point that I just want to make briefly lest it slide under the rug is this: whatever the case may be in Buffalo, it is the case of General Auto Sales and none of the other plaintiffs in this case, most especially not Nabcor, because Nabcor didn't try to get any cars in Buffalo.

The testimony was that these were cars for Strimple and to facilitate Strimple's setting up his master distribution, his 50 brokers in every county or 20 brokers in 50 counties or whatever.

THE COURT: He said he requested it for the Nabcor System.

MR. KAPLAN: He did use the phrase.

THE COURT: He had the man up from North Carolina.

MR. KAPLAN: The man from North Carolina relates to the proposal of Strimple to send used cars from Batt Buick by train, and I gave the page reference about that.

The reference that relates to this whole broad concept of this thing was the reference to Strimple setting of 20 brokers in 50 counties and shipping cars there.

THE COURT: You are saying there is no evidence indicating that Maiorana wanted or Nabcor wanted to have Gillogly in Buffalo or any supplier to other places?

3 MR. KAPLAN: Right. There are a couple of reasons that support that. First and foremost, we are

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talking about the Fall of 1967, at which time Nabcor is getting everything it wanted from Rohrer Chevrolet in the way of Chevrolets.

Secondly, we have the testimony by Bolling and Strimple, at least one of them, that it was not acceptable or not a reasonable way of doing business for them to get cars from Rohrer Chevrolet and have them shipped to Buffalo.

THE COURT: They would have asked to have a drop shipment.

MR. KAPLAN: Marvellous, but there is no real evidence to support the view that the cars were going anywhere but to General and General's brokers. Nabcor would have no standing on any claim relating to that, even if there were some assertion that Nabcor lost royalty income that it might make, there is no standing.

Finally, I didn't go to Degnan at great length or spend any time on it. As I mentioned before, they weren't in the Dealers Association, and the record appears they did not get this bulletin, and the reasons --

THE COURT: You mentioned Degnan.

MR. KAPLAN: I will go to the points that your Honor averted to after one other comment, which is this:

We do have here the records of all these sales by these dealers in Buffalo starting in early 1968, and I would suggest it is pretty strong circumstantial evidence there was no conspiracy at the end of 1967 because there is absolutely nothing on the record from which a jury could conclude that there was any change of circumstances between the end of 1967 and the beginning of 1968.

Mr. Strimple would explain all of these sales on one of two theories. The first theory is his grand jury investigation. It is admitted and in evidence that the grand jury investigation did not happen before March, 1969. While Mr. Strimple went to the United States Attorney in February of 1968, there is absolutely no evidence whatsoever that anyone other than Mr. Strimple knew anything about it, and therefore you cannot infer that the dealers began selling in early 1968 because of the fear of an investigation. There is just no evidence. Strimple didn't say he told anybody. That is the first point.

The second point is that conflicts about when Econo-Car was, the simple fact of it is that on Strimple's own testimony the dealers with whom he dealt knew which cars were for him and knew which cars were for Econo-Car. He admitted that the cars at Gillogly were invoiced to Econo-Car -- I am sorry, to General. He testified at 2528.

He testified at 2528 and 2531 that when he spoke to Gillogly to order cars for the business as opposed to for Econo-Car, he told them that they were for General, and he testified at 2620 that he did not tell the dealer that the cars he was getting for his own business were for Econo-Car.

Nobody was fooled. There wasn't any subterfuge, that is just nonsense, and if the claim is that they suddenly started selling to Strimple because he had some connection to a big customer, well, frankly, your Honor, I just don't see how that really explains it.

THE COURT: Let's pass that. The application for any allowance was in the name of General.

MR. KAPLAN: Yes, that all was.

Let me come to the subject of injury. The only testimony about any orders placed or attempted to be placed with any dealers in Buffalo are the seven orders which Bolling says he took at Multi-Make, held on to until there was a General and tried to place them in Buffalo. They are listed on Defendants' Exhibit F-7.

One of them is for a Cadillac, and there is no evidence here that he didn't get a Cadillac in Buffalo.

One is a Pontiac, and there is no evidence in this record about the Pontiac, any attempts to get a Pontiac in Buffalo.

So we are left with the five Chevrolet orders of which are Corvettes and the like.

Of those five Chevrolets, the plaintiffs ultimately got two or General ultimately got two, the Vosseler and the Chambers, and then the three they didn't get.

On any conceivable stretch, that is the sum total of the Buffalo problem, because the testimony could not be clearer that they never tried to order any other cars but these from any dealer in Buffalo before 1968, at a time when they got whatever they wanted. That is the whole thing. That is what we have been here for all this time.

Let us analyze those three orders.

THE COURT: I don't think we have to. We have been through this.

MR. KAPLAN: The simple fact is this, and

Bolling testified that he took all of those orders the first month that he was in business, which is placed somewhere between the 11th of July and the 25th of August, because it is unclear just when he started out.

So from the 25th of August, on the evidence most favorable to plaintiff, until some time in October, Bolling makes no effort whatsoever to get those cars because he didn't order them from Nabcor and he was just a broker and didn't try to get any cars from dealers in Buffalo during that time period.

Then he wanders around Buffalo a while with these customers' orders, people who paid him money, and doesn't order them from Nabcor until November 13, and four days later they are cancelled.

Now, the delay is supposed to be the reason for the cancellation, and who is responsible for the delay? Bolling.

Bolling has been walking around with these orders for months, and the one thing I want to point out about that is, let's suppose some time in October one of these dealers in Buffalo said, "We will get you these three cars." On Mr. Maiorana's testimony, that would have taken four to six weeks under the best of circumstances, and this was the start of the model year, and that brings us into the middle of November, by which time the customers had cancelled anyway.

THE COURT: Bolling's testimony is where?

MR. KAPLAN: In the 2000 range.

THE COURT: Well, let me tell you right now, Mr. Person, I think that I am entitled to an explanation as to how Mr. Bolling on your direct could state what he did on direct, and that is referring, I think, to page 2140. He testified to your questions he obtained eight to ten orders in the first month.

You asked him, "What did you do with those orders?" And he answered, "Placed them with Nabcor in Philadelphia."

He said he was not able to obtain all of those automobiles, did not obtain all of these automobiles.

Then you asked him, "Do you recall how many of these ordered automobiles you obtained?"

"None."

4 The next question, "Did you do anything at that time to attempt to obtain a source of supply of automobiles?"

"No, we did not."

Then on cross-examination he was confronted with the documents about the failure to send the deposits and orders to Nabcor, and he completely reversed his testimony.

He testified in effect that the first thing he did after getting these orders was hold them to go around Buffalo to get sources of supply and only later did he send the orders to Nabcor and without deposits. It is a complete 180-degree contradiction, and I think that is something so glaring I would like an explanation tomorrow.

There are a number of other references, and that is in the beginning of November 15.

MR. KAPLAN: Anyway, as I was saying, your Honor, it comes down to three cars which customers cancelled due to the delay. It is the delay which Mr. Bolling was responsible for and a delay which would have been the equivalent --

THE COURT: I don't think you have to belabor that.

MR. KAPLAN: Finally, let's take the wildest assumption for the plaintiffs by saying they lost these three cars due to a conspiracy. There is not even any evidence about lost income, there was no General, by virtue of getting those cars.

I looked at the record and found absolutely not a scrap of evidence --

THE COURT: There was a loss of opportunity to sell franchises.

MR. KAPLAN: There is nothing on that, on the franchise end of it. The only testimony is there were a number of prospects. They had the dinner at the Charter House, and Mr. Strimple testified not once but twice that he told all of these people that he had no supply problems, Nabcor was getting all the cars he wanted. That is at 2513 and 2555.

If you can turn to that, your Honor pressed him quite hard at 2514 and 15, and you asked, "Anything else about the source of supply?" Referring to what he said at the meeting at Charter House.

Strimple answered, "The source of supply was through the system, and there was no problem in supply." That is the first thing that he told you.

At 2555 on cross he was asked the following question and gave the following response:

"Q This is the same period of time in which you had meetings at the Charter House where you told these prospects that you had no difficulty getting cars, true?

"A I told them that Nabcor could supply the cars because I already had received one that I ordered and I believed they could."

He went on to say that he told them the dealers would not be happy, but he never took that back, so the only evidence on this record of what the people to whom Strimple was trying to sell franchises knew about the source of supply of cars is that there was no problem.

THE COURT: Wasn't there some testimony about prospects learning about problems of warranty service?

MR. KAPLAN: You may be right, but I just don't know, your Honor. I will look for that overnight.

I am told that there was testimony by Young, and that is the time where he couldn't specify any dealer, if you recall that. Young was asked why he couldn't sell franchises, it is not Mr. Strimple.

THE COURT: No specifics and no definite tie to General Motors versus other people.

MR. KAPLAN: Not at all. I might observe further that if prospects had a concern about the warranty problem, that is just not part of the case.

Maybe there was a warranty problem, but it was a legal warranty problem.

THE COURT: The point with Young is that there was absolutely no specifics given, no names, no places, nothing. This was not Strimple or Bolling.

MR. KAPLAN: That is right. I would just finish up on this point of entry, and I would like to let Mr. Watson follow with the other points. We also have other evidence here about the Buffalo operation, which I think is fairly important.

Strimple admitted that from the period February 1, 1968, until he went out of business in July, 1970, he had absolutely no difficulty getting all the automobiles he wanted, and he made absolutely no efforts to sell any franchises. Point No. 1.

Secondly, this argument about running out of capital in October, November, 1967, simply doesn't wash.

Strimple, first of all, testified that he didn't run out of money until the end of 1969 or the beginning of 1970. That is page 2509.

The exhibits we offered showed advertising that General Auto ran, and admittedly it is incomplete.

THE COURT: He had an explanation for running out of money?

MR. KAPLAN: Strimple indicated that he didn't run out of money until the end of 1969 or the beginning of 1970. That is page 2509.

I will just get that out and make sure I am quoting it accurately.

THE COURT: Read that, please.

MR. KAPLAN: This is on direct by Mr. Person:

"Q Did there come a time in which you had insufficient capital to continue the business activities of General?

"A Yes.

"Q When did this occur, approximately?

"A I would say I finally folded my curtains around the last of 1969 or early 1970."

That is 2509 of the record.

THE COURT: Is there other testimony? The trouble is that there are indications when these witnesses gave different versions, and I suppose the jury could choose which one to believe.

MR. KAPLAN: This is one indication where that is not so. Bolling testified they ran out some time in 1967. Bolling, however, concededly left the business at the beginning of 1968 and the business concededly went on for two and a half more years or two more years, and how could you say they didn't have enough capital to operate the business at the end of 1967 and the business continued for two and a half more years? It just defies reason, I think.

THE COURT: I address this to all counsel, what General did after the beginning of -- General did not sell cars. If there is evidence about car sales it is -- I think we talked about this many times -- and there is no definite evidence of any car sales by General except the one to the daughter, and there may have been three or four or five others. But that, I think it is conceded, is the very earlier stage.

So beginning around 1968 General didn't sell any cars on its own. It didn't sell any franchises. I don't know what it did, except pass through the orders received from Mr. Young.

MR. KAPLAN: It did that. It did run advertising into early '68, which is in the record.

THE COURT: How early or how late?

MR. KAPLAN: January. But I would simply point out that what it did in '68 and after is no different from what it did in '67 at all, because I think that even on the estimate most favorable to the plaintiffs there is no claim here that General ever got more than ten orders for cars.

I think, your Honor, that the fair summary is that Strimple had a grand design and it never got off the ground at all. It didn't have anything to do with General Motors.

THE COURT: We better get to Mr. Watson.

MR. KAPLAN: I would like to break now and let Mr. Watson take over on behalf of the dealers.

THE COURT: You are speaking for --

MR. WATSON: I'm speaking, your Honor, for Batt Buick, Bain Chevrolet, Gillogly Chevrolet, and the dealers association, the Niagara Frontier Dealers Association.

Only the first three counts, your Honor, concern these defendants.

THE COURT: I have dismissed the second

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count.

MR. WATSON: I would like to move for a dismissal of the second count.

THE COURT: It's been dismissed.

The third count --

MR. WATSON: I don't think --

THE COURT: Worry about the first count.

MR. WATSON: I move to dismiss the third count for all the defendants I represent.

THE COURT: I would dismiss the third count.

MR. WATSON: I would like to discuss the first count, and I will try not to reiterate the factual summaries that Mr. Kaplan so ably gave us.

First, if I may, I would like to discuss Batt Buick. Again, I will not go over the facts, except it appears to me that based on my understanding of the testimony, the evidence before the Court, Batt Buick never refused any order to General or Strimple or Bolling. As I understand it, our only contacts between the plaintiffs and the Buffalo defendants was between Strimple and General.

THE COURT: I hate to have you come all the way from Buffalo andcut you off, but I think we have gone through the evidence so much that I don't know much more that could be said about Batt Buick.

MR. WATSON: I agree with that.

THE COURT: I know you have not heard what Mr. Person says tomorrow, but I think the issues are pretty well defined and the facts are such that not more can be said.

MR. WATSON: Other than it's astonishing to me that there are no facts that the plaintiff has introduced on the part of Batt Buick.

THE COURT: Pass to some of the others.

MR. WATSON: Then, if I may, Glenn Campbell Chevrolet: It appears from the evidence, as I understand it, that there was only a single contact by Strimple on behalf of General Auto Sales, and this was the incident described by Mr. Kaplan when Mr. Strimple contacted the sales manager, Tony Pierri, concerning possibly the purchase of 200 automobiles; that was refused. There was no other contact. So far as I can ascertain, there is no other evidence involving Glenn Campbell Cheveolet in any conspiracy with anyone.

THE COURT: The question, it seems to me, with your clients, is a little different from General Motors. You have the association. You have situations with Gillogly where there is admissible evidence of collusion between Gillogly and at least this district manager of General Motors by the name of English. Just by virtue of the rules of evidence, if nothing else, there is more against your people to some degree than there is against General Motors. That's what I really have to hear about.

MR. WATSON: I would say to the Court I find no evidence of any thread that connects these dealers between themselves.

THE COURT: What about the association bulletin?

MR. WATSON: The bulletin was nothing, as I view it, other than an expression of dislike for discounters; not just this particular discounter but of discounters.

THE COURT: We are dealing with a motion to dismiss. You can argue that to the jury. How about on a motion to dismiss?

MR. WATSON: Factually, the bulletin, as I see it, describes the business tactics of discounters. Factually it talks about discounters other than Nabcor.

THE COURT: Let's not waste time.

The middle of the second page: We cannot for the life of us think if any reason why a retail dealer would want to get involved in any scheme. It would only defeat the purpose for which you are in business. Sure hope you all feel the same way.

What business does the association have sending out material hoping they "all feel the same way"?

MR. WATSON: It's an editorial expression by the editor ofthe bulletin, and I don't divorce that fromthe association itself. Nevertheless, it's an opinion of distaste for the tactics of discounters. They are competitors.

THE COURT: You argue that to the jury but on this motion I have to construe these things in the most favorable light for the plaintiffs. That's a construction but it's certainly not the only construction.

Let's assume that the jury could find that this bulletin was circulated to your dealer clients. I don't know what the circulation of the bulletin in and of itself is not a conspiracy, but at least, the jury could findthat this was not simply just a bare academic statement of views for contemplation. The

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hope was that there would be action taken.

The question would be: Was the action taken? Was conspiratorial action taken among these dealers? Was it taken with General Motors? Was there the requisite injury and damage?

MR. WATSON: I submit there is no other evidence other than the fact that the bulletin exists, that any officer of the association, any director of the association, did anything to interfere with the bueiness of these defendants.

THE COURT: The bulletin is something in and of itself.

Could not a jury infer that Campbell refused to deal because it got this bulletin?

MR. WATSON: Could you not equally infer that Glenn Campbell refused to deal with these people because he was not willing to sell for $25 over cost or because they were people without credit or they were people without a fleet certificate. There are many reasons why he could refuse, I submit, your Honor. There is no proof whatsoever that Glen Campbell considered this bulletin other than he was a member of the association and on the mailing list.

THE COURT: Doesn't that present a jury

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question?

MR. WATSON: I think not, your Honor.

THE COURT: I don't expect you to agree with me, but I've got to tell you on this, taking it one step at a time, it would seem to me there was a jury question if the purpose of the memo is at issue; a jury could find there was a purpose to induce action. It seems to me that the jury could further find that the people in authority at Campbell, at Bain, and Gillogly refused it, and the jury could further find that Campbell refused to sell because of the bulletin.

As far as Batt, I would agree with you. I'm stating these things tentatively. I'm not trying to write a decision. It's late in the day and I want you to be aware of the problems. That's the main thing I am saying. Instead of raising questions I'm just thinking out loud for your benefit. I think Batt really never refused to sell. I would agree with that. The record is conclusive on that.

But Campbell did refuse to sell. I guess the jury couldfind perhaps, although this is quite confusing, that perhaps Gillogly did, although that is not by any means as clearcut.

As to Bain, let's look at the testimony

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about Bain.

I think the jury could find, could they not, that Bain refused to sell not only because of the bulletin but because it was told by the zone not to? There is a lot of testimony about Bain.

MR. WATSON: If I might talk about Bain for a moment, as I understand it, there is testimony about telephone conversations between Mr. Maiorana and Bain. As to those conversations, Mr. Maiorana said in sbbstance that Bain was refusing to sell 200, 400 cars or whatever.

THE COURT: And Mr. Maiorana, I think, testified that Bain said that the zone said not to sell to him.

MR. WATSON: Or words to that effect. But at the time of this alleged occurrence Mr. Maiorana and Nabcor were getting all the cars that they wanted.

THE COURT: No, they were not.

MR. WATSON: I have not been here but I understand that Maiorana said he did have suppliers.

THE COURT: All these talks were supposed to have taken place in the fall of 1967.

MR. WATSON: It's my understanding that at that time Nabcor had itssuppliers.

THE COURT: You are shifting in field.

But as far as a source of supply to General as a new master broker, General didn't have any commitments, and the jury could certainly fine that General was trying to go out and get commitments. I raise this more as a question: Could not the jury find that Bain refused to make the commitment because of the association bulletin and because it was told not to by the zone? That's the testimony. If the jury believes that testimony, would they not so find?

MR. WATSON: It seems to me the substance of the testimony by Strimple and Bolling concerning "developing local sources" was at a time when they had no orders, they had no franchisees, they were talking about thepossibility of dealers selling or committing to them over a period of years unknown quantities of cars.

THE COURT: You are saying that even if the jury could find a conspiracy, refusals to make commitments pursuant to the conspiracy, it caused no injury or damage; is that right?

MR. WATSON: I think I'm saying a little more than that. I'm saying really that Strimple and

Bolling were not asking for commitments of 200 or 400 cars. They were talking about the possibilities they hoped they would be able to buy.

THE COURT: A jury could find, could they not, they were asking for commitments?

MR. WATSON: The commitments for what?

THE COURT: 200 to 400 cars.

MR. WATSON: 2000 cars.

On this type of testimony I can't imagine submitting that issue to a jury. These people had no capital. They had no orders. Every order for a car that they actually placed was filled by the Buffalo dealers, as I recall it.

THE COURT: I don't want to get involved in semantics, but, again, speaking tentatively -- it's late and you are about to go -- I wouldhave to say to you that it seems to me that the issue about the association and your dealer clients is this:

Assuming that there is a jury question as to the existence of a conspiracy and as to their refusal to make commitments because of the conspiracy, still, the question is whether there is any jury question about whether there was injury or damage.

MR. WATSON: Injury or damage? I would

submit there is nothing to support injury or damage to these plaintiffs as a result of these incidents.

May I just briefly discuss Gillogly Cheveolet.

I submit there were two incidents involving Mr. English allegedly, and allegedly Mr. English made threats about: no dealer will work with you or sell to you. I submit that as to Gillogly Chevrolet, if that was a threat it was not followed by Gillogly. They did not bow to this threat. They always sold, commencing in January, which was the first time this fellow placed an order with Gillogly Chevrolet over a period of two years.

THE COURT: Correct me if I am wrong but I don't think there is any evidence, Mr. Person, that General or Bolling or Strimple went back to any of these dealer defendants except Gillogly and actually asked for cars.

Of course they went back to Gillogly because they ordered cars and they got cars.

MR. KAPLAN: Also Bain.

THE COURT: All right, Bain.

I guess it shapes up this way: As far as going back in late '67, beginning December '67 or early

'68, going back to these dealers and placing specific orders on behalf of General, they went to Batt; they went to Gillogly; they went to Bain -- and they got cars.

As far as Campbell, I don'tthink there is any evidence that they ever went back and tried. Unless I hear to the contrary, Mr. Person, I'll assume that's the record.

MR. WATSON: In addition to selling them automobiles over a period of two years, Gillogly Chevrolet conducted some correspondence in July and August of '68 in an effort to secure a fleet rebate for General and, in fact, succeeded. That scarcely constitutes the act of someone who is trying to damage their business or interfere with their business.

As a matter of fact, I submit, your Honor, that the facts are that over a period of two years Gillogly Chevrolet was the best friend that these plaintiffs, General Auto Sales and others, had in the Buffalo area or anywhere else.

I submit that it would be really a miscarriage of justice to submit Gillogly Chevrolet to a jury on this evidence.

Mr. Kaplan covered all the other factual situations. I can't add to that. He is far more aware of the evidence than I am.

I submit, your Honor, that these defendants, although they may be somewhat removed geographically, have lived under the shadow of this case for six years. It's time the shadow was lifted and all counsel dismissed at to all these defendants.

THE COURT: I want to say this: When I was speaking tentatively about there being a jury question on the existence of the conspiracy, I rally had lost sight for the moment of the fact that there were the sales by three out of four of these dealer defendants in '68 and '69. I think that, again, the standard is pretty high to get a dismissal.

MR. WATSON: I understand that.

THE COURT: But I'll have to think pretty carefully in view of those sales that occurred when actual orders were given, I guess perhaps there is more. Even on the basic conspiracy question it is weaker than I may have thought at the moment.

I will certainly consider that. I appreciate your coming down.

MR. WATSON: Thank you, your Honor.

You will also consider the question as to whether they suffered any injury or damage?

THE COURT: That's basic.

MR. WATSON: I do appreicate, your Honor, and everyone else waiting on me for this late date. If I am needed in the future I assume I will be summoned.

Thank you very much.

THE COURT: We have finished the defense side?

MR. KAPLAN: No, your Honor. We have not. We are very close to having finished, but we have to deal with Mr. Turco.

We have a brief point on the question as to whether there is anything relating to fleets left. We are willing to do that tonight or tomorrow, as your Honor pleases.

THE COURT: I thihk we have to suspend now.

What I would liketo do --

MR. KAPLAN: I would remind your Honor that we kind of left GMAC up in the air.

THE COURT: What is the earliestyou could get here?

MR. KAPLAN: I think we could cover

everything I have left in ten or fifteen minutes.

THE COURT: I want to give Mr. Person the maximum time. Considering the lawyers and the court reporter. I'm talking about 8 o'clock.

MR. KAPLAN: 8 will be a hardship for me. I have an hour and some on the train.

THE COURT: Can't you stay overnight?

MR. PERSON: I need the time. I spent all night long, and it chops out a portion of my time to prepare.

MR. KAPLAN: I would be happy with 9. Had I known it I would have been glad to make arrangements.

THE COURT: I think maybe we'll go for about 15 minutes now and then we'll meet at 9 o'clock.

MR. KAPLAN: Thank you, your Honor.

THE COURT: Do what you can.

MR. KAPLAN: I'll do the little odds and ends.

First of all, we have that little fragment of count 17, in financing --

THE COURT: Let's hear from Mr. Person on that.

MR. KAPLAN: I'll hold that to tomorrow

then.

THE COURT: Turco, I think, is one thing you must cover.

MR. KAPLAN: As far as Mr. Turco goes, first of all, we have the fact that he testified in substance, or at least in the absence of any evidence to the contrary, that he had not any real difficulty getting cars. He got most everything he wanted.

Mr. Kleinbard has already dealt with the episode involving Curry Chevrolet, and I won't repeat it. The long an dshort of it was that there was no evidence that Turco had any problem getting Chevrolets.

THE COURT: Can you be specific? We have gone through pretty well tying these things down either to the statistics or to specific admissions. Let's go through the same exercise with Turco.

MR. KAPLAN: If your Honor will give us a second to collect our papers on that --

MR. KLEINBARD: While Mr. Kaplan is looking for the papers, we touched on and then moved off twice, I believe, fromthe motion to dismiss on behalf of GMAC. I would like to have the r ecord complete. I don't think there is anything connecting GMAC to any conspiracy. I discussdd ittwice and for one reason or another --

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THE COURT: I want to hear Mr. Person on that. You remind me on that part of it. That's different from the financing part.

MR. KLEINBARD: It's part of the alleged conspiracy.

THE COURT: While Mr. Kaplan is looking, I asked that these books, to the extent there were sheets at the end reflecting transactions not in Exhibit 450, those sheets should be integrated with the rest of the sheets and marked in some way NL or not in log.

MR. SILVERMAN: There is a red asterisk in the upper righthand page --

THE COURT: I see it.

MR. KAPLAN: As far as Turco is concerned, there was no testimony that he had trouble getting cars other than with reference to Curry Chevrolet and Byrne Brothers, and his testimony about Marty Motors.

THE COURT: As far as Curry, we covered that. What is the point on Curry?

MR. KAPLAN: There is no evidence that Turco really had any trouble getting Chevrolets anywhere.

THE COURT: What did Curry do?

MR. KAPLAN: Curry read, according to Turco, at 2831 that he had to have a fleet certificate and if my notes are correct this testimony was not admitted against General Motors anyway, at least the part of it relating to the fleet certificate.

THE COURT: Did he order from Curry?

MR. KAPLAN: He said he tried to buy there and that's all he said. He didn't say he placed an order.

THE COURT: When was the incident with Curry?

MR. KAPLAN: 1968 or 1969.

THE COURT: Are you sure that it was not admitted as to GM?

MR. KAPLAN: I have the reference right here. At page 2831, if I am not mistaken. As a matter of fact, it was not admitted against anybody. He was asked whether there was a condition placed on his ability to buy cars by Curry or Byrne and he said yes; and he was asked what the condition was and he said that he didn't have a fleet certificate; then your Honor struck the latter testimony. So that's not in at all.

THE COURT: The Curry matter we must pass then.

MR. KAPLAN: Yes.

It is pointed out to me that subsequently your Honor reversed that ruling and said you were taking it simply as something told to Turco but not as evidence that GM in fact had such a requirement, and that's at 2831 and 32.

THE COURT: I'm sure we covered this many times but the statistical material that we have, if I wanted to look somewhere and find out Turco's record of getting cars or not getting cars, where would I turn?

MR. KAPLAN: Two places. First of all we have three exhibits, Defendants' Exhibit X7, Y7 and O8, which is a record of the orders that Turco placed with Nabcor.

Secondly, we have Defendants' Exhibit F, which is the record of cars which Nabcor and Turco got from the New York area dealers, and there are asterisks indicating the ones which are Turco cars.

THE COURT: As far as your claim regarding Turco, is it embraced in 699 and the delay documents, Mr. Person?

MR. PERSON: Well --

THE COURT: Is there any claim about

inability on the part of Turco to get cars?

MR. PERSON: I would rather have them state what it is that the record has.

THE COURT: No. You are the plaintiff. I certainly intended, although I may have not made it clear, to get your entire claim about cars from you.

I hope that 699 is intended to embrace Turco as well as Nabcor.

MR. PERSON: It was intended to cover Turco in the same way it covered Nabcor insofar sa these cancellations.

THE COURT: Is there anything in 699 about Turco?

MR. KAPLAN: There is nothing in there about Turco except insofar as it may relate as to orders that Turco may have placed initially with Nabcor.

MR. PERSON: That would be a correct statement, your Honor.

THE COURT: In other words --

MR. KAPLAN: 699 would have in the claims of inability to get cars by Turco insofar as those were orders Turco placed with Nabcor, but not insofar as they were orders Turco tried to get directly from dealers himself. There has been no claim at any juncture about that, about Turco going to dealers and being refused except for testimony about Byrne and Curry.

THE COURT: What I take from Mr. Person's statement is that 699 is intended to cover Turco to the extent there are any claims of refusals about Turco, right?

MR. PERSON: Other than what his testimony is, yes.

THE COURT: What do you claim his testimony shows?

MR. PERSON: 699 is not in evidence. It's an attempt to indicate the cancellations.

THE COURT: But it's a statement of your claim?

MR. PERSON: It's a statement of the cancellations.

THE COURT: Do you claim there are any other cancellations or any refusals to deal that relate to Turco other than the one listed in Exhibit 699?

MR. PERSON: We have evidence that there is a refusal by Curry and by Byrne and by -- I indicated specific orders that were cancelled in 699. That was what that intended to cover.

THE COURT: I would like to get what you claim. If there is additional evidence you tell me what you claim and then I'll know what to deal with. Do you know what you claim about anything in addition to what is in 699?

MR. PERSON: Insofar as any claim for Turco in this lawsuit is concerned?

THE COURT: About refusals to sell or cancellations.

MR. PERSON: We have had the cancellations that are reflected in 699.

THE COURT: There is only one.

MR. PERSON: We had the refusals and I guess those are Cadillacs.

THE COURT: Tell me what you claim within the time period. We start with order No. 323 contained in 699, and it refers to Turco. It's about AC Chevrolet, so we have that.

Do you claim any other cancellations or any other refusals to sell that were suffered by Turco within the damage period other than this order 323?

MR. PERSON: The refusals to sell that he had testified to would be part of it.

THE COURT: What are those? Do you

understand his testiomony well enough to tell me what you claim it means?

MR. PERSON: The testimony that has already been discussed indicates that he had been refused in attempts to seek sources of supply, so I claim --

THE COURT: I have a feeling you don't know the testimony.

MR. PERSON: I have heard the testimony and I have it written down here: Byrne Brothers, Marty Motors and Curry.

THE COURT: Mr. Kaplan, what is the testimony again?

MR. KAPLAN: The testimony is that he went to Curry sometime in 1968 or 1969, page 2825 of the transcript.

THE COURT: You are talking now about Curry.

It's so late I'm punchy.

MR. KAPLAN: He tried to buy cars there, page 2830 of the transcript; that he did not get cars there, 2830 or 31; and admitted solely for the purpose of showing that it was said to him but not for the truth, that Curry said to him he didn't have a fleet certificate.

I would point out --

THE COURT: Putting aside the limitation on the evidence, is there any number given?

MR. KAPLAN: No specific orders, nothing. No.

I would point out in addition that Defendants' Exhibit Y7, which is the analysis of Turco's orders to Nabcor, shows that all through '68 and '69 Turco got substantially every car he ordered, including Chevrolets, and there really just was not any problem with Turco. The bottom line with Turco, his orders to Nabcor, as reflected in Y7, is that there were 84 orders that he placed with Nabcor. In 70 cases the order log shows he got the car. In four additional cases some other document shows he got the car, so that's 74 so far.

In two cases the Nabcor log indicates no order to a dealer. In four cases the log indicates cancellations, and I'll come back to that. In four cases it indicates no disposition.

The four cancellations --

THE COURT: Four cancellations?

MR. KAPLAN: Yes. One was a Chevrolet.

THE COURT: How many "no dispositions"?

MR. KAPLAN: Four.

Of these four cancellations and four no dispositions there is only one complained of in Plaintiffs' Exhibit 699, and since these were orders from Turco to Nabcor he's limited by that. We are talking about one claim of non-delivery and ordered through Nabcor.

So, basically, Turco had Nabcor as an available source and he got what he needed.

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Now, I am going to Byrne Brothers. The evidence on Byrne Brothers is almost identical to the evidence on Curry. He testified at page 2830 that he tried to buy--

THE COURT: What is the date?

MR. KAPLAN: Post the damage period, somewhere in 1971 to 1973, that is in cross-examination.

THE COURT: You mentioned these Exhibits X-7 and O-8, and I guess I better take them. O-8 are orders prior to --

MR. KAPLAN: We are not really concerned with that.

THE COURT: December 10, 1966.

MR. KAPLAN: Y-7 is GM orders and X-y is non-GM cars. We can pass that also.

THE COURT: We might pause a minute on O-8. I would say that most of those are so old, this is July, 1966, that I would not consider them within the damage period.

This one, 11186, I don't know when the cancellation occurred.

MR. KAPLAN: Plaintiff is not making any claim about it in 699.

THE COURT: All right.

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I think we will have to suspend now, and are you finished now?

MR. KAPLAN: Not quite. I have very little left.

THE COURT: I think you can finish tomorrow morning.

(Adjourned to December 2, 1976, at 9.00 A.M.)

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NATIONAL AUTO BROKERS CORP.,
et al.,
Plaintiffs,
vs.
GENERAL MOTORS CORPORATION,
et al.,
Defendants.

70 Civ 5 421A

New York, December 2, 1976;
9.15 A.M.

(Jury not present.)

Trial resumed.

- -

THE COURT: We have to talk about our schedule. One of my sensitivities at this point is this jury, and they can't obviously know what we are about, although I think whatever rulings there are will be announced to them, and they will obviously know unless the motions are entirely denied. The motions haven't been entirely denied, so there will be no rulings on the motions.

I am sure that we will not be ready to rule on the motions completely at any time today. I have the jury coming in this afternoon. It does seem to me, however, that Mr. Person ought to be able to finish his argument, he will have almost all of today to the

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extent he needs it, and I think you said to my law clerk you think you will need more than today?

MR. PERSON: Yes.

THE COURT: It seems to me, however, -- how much time do you think you will need?

MR. PERSON: I will try to get the whole thing done by tomorrow and really don't want to go --

THE COURT: I have a motion day tomorrow.

MR. PERSON: Then Monday, but I don't want to go beyond that.

THE COURT: What we really ought to do is try -- the last two days have gone very slowly because I stopped constantly to dig out statistical material, so the total time of the argument to me has probably been much less than the two-day time. There have been lots of breaks and so forth, as we usually seem to have to do.

It seems to me that a full day today with a minimum of interruptions and then tomorrow I think that I could start in again with you some time in the middle of the afternoon. I will work on that.

But it seems to me that if you still have something to do, you can take some time and we will just work as late as we need to, and I will try to rule

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on those motions.

I think that in courtesy to the jury, they should be brought in late tomorrow, so they can be apprised of where the case stands, but unless somebody is concerned about this, I will call them this morning and not have them come in.

However, if the lawyers think that it is good siscipline to have them come in and so forth, I can do that. What is your thought?

MR. KLEINBARD: Your Honor, as far as we are concerned, I think I would just as soon not discommode the jury today just to come in and be sent back again.

MR. PERSON: I agree wholly, your Honor.

THE COURT: All right. I will have either my court clerk or my secretary call the jurors and tell them to be in tomorrow at 4 o'clock.

I want to ask you some questions and it is a good way to start the day, to have an interruption right at the start. I tried to go over as a kind of sample the Chevrolet material, that is, Exhibit E-9 and Exhibit J-9, both for identification. I want to make absolutely clear that we have here, because questions came up that I realize I didn't understand.

MR. KLEINBARD: Could we defer that part until later, because the fellow who has those books has not made it to court yet?

THE COURT: Sure.

MR. KLEINBARD: I was discussing the claim made on behalf of Nabcor of East New York, Mr. Turco, and I was about at the end of that.

I was making the point, I believe, that the only claim made on Turco's behalf with respect to inability to get cars is page 73 of Plaintiffs' Exhibit 699.

THE COURT: Just give me a minute.

MR. KLEINBARD: Where the plaintiff claims one car ordered for Turco from A.C. Chevrolet was cancelled, and I am not going to say any more about it. We talked about A.C. Chevrolet, and what I said before applies here, there is just no evidence.

Passing that, then, we do have Mr. Turco's testimony about Marty Motors. He said that 10 or 20 Cadillacs that were ordered, and the record is by no means clear on the question whether they were ordered --

THE COURT: The plaintiffs' claim is at what page?

MR. KLEINBARD: Page 73, and that is the only

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claim, Plaintiffs' Exhibit 699.

THE COURT: What is the date of that?

MR. KAPLAN: It is 1967. The plaintiffs said that this record indicates a cancellation July 11, 1967.

THE COURT: We are passed that.

MR. KLEINBARD: I was going to Marty Motors. Mr. Turco did testify that perhaps as many as 10 to 20 Cadillacs which were ordered from Marty Motors were titled to the customer rather than to Nabcor or Mr. Turco's company. The record is by no means clear whether those cars that were ordered for Nabcor or Nabcor of East New York, but in any event, Mr. Turco did testify that they got those cars, and the only problem is that they paid higher prices. Thatappears at page 2843 and 44 of the transcript.

There was never any testimony about what higher price they paid. Therefore, even if one were to draw some inference or find liability relating to Marty Motors episode, there is no basis for making any finding with respect to damages or the amount of damages.

But passing that, there is one more comment about Cadillacs that I think ought to be made in connection with Colonial, and that is this:

The crux of plaintiffs' case here with Cadillacs,as with everybody else, has to be that there was some conspiracy between one or both of these two Cadillac dealers, Marty or Colonial, and Cadillac Motor Division of General Motors.

I would simply point out to your Honor that the plaintiffs called Mr. Murray from Colonial. Mr. Murray testified nobody from Cadillac ever said a word to him about Nabcor.

That testimony was not even impeached on redirect examination. There was no attempt to challenge it at all nor did plaintiffs call any witnesses to impeach Mr. Murray's statement, and I believe, your Honor, that in those circumstances, Mr. Murray's testimony has to be accepted as true for the purposes of this motion, putting aside the lack of evidence to the contrary.

THE COURT: Couldn't the jury reject Murray's credibility?

MR. KAPLAN: I believe the cases are where plaintiffs call the witness who testifies against them on a critical element and dont even attempt to impeach him, they are not permitted to do that on this motion or your Honor is not entitled to assume they would do that.

If necessary I could get the authorities for your Honor, I don't have them here. But the key point, of course, is there is just no evidence there was ever any contact between Colonial and Cadillac at all.

THE COURT: In other words, if the jury has a problem with the credibility or demeanor of Mr. Murray, or something like that, you would say that isn't a substitution for some evidence in favor of the conspiracy?

MR. KAPLAN: That is right. But I go one step further, which is that I think on cases on directed-verdict standards where the plaintiffs call a fellow like Murray, who testifies in substance there is no claim, and proceed not even to attempt to impeach him, that courts on a motion for directed verdict must accept that testimony.

But, as I say, we don't need that here. That takes care of what I wanted to say about Marty Motors and Mr. Turco and Cadillac.

It brings me to the question of what possible injury there could have been to Mr. Turco.

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THE COURT: I'm going to ask you this -- I'm sure we have had this question so many times it's quite tiresome -- will you refresh my memory as to whether there is evidence that Turco made purchases from sources of supply of his own?

MR. KAPLAN: There is a limited amount of such evidence. It is on Defendants' Exhibit F.

THE COURT: That's right. I think I better get that now.

(Pause)

MR. KAPLAN: I have one for you, Judge.

(Pause)

THE COURT: What does that show?

MR. KAPLAN: The direct purchases by Turco are asterisked on Defendants' Exhibit F and if I am counting correctly there are six. That's all the evidence of direct purchases by Turco.

We covered yesterday the claims that Turco made with respect to Curry and Byrne, and that's the sum total of the evidence.

THE COURT: Let's see what Turco bought direct: One Oldsmobile from Marty, 1/18/68; one Buick from Bano, 12/24/68; one Pontiac from Apuzzo, 5/7 69; one Pontiac from Apuzzo, 6/30/69; one Pontiac

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from Apuzzo, 5/21/69; and another Buick from Bano, 10/9/70.

Go ahead.

MR. KAPLAN: Your Honor's question reminds me that I had promised to inform you about the rule in this circuit on prior inconsistent statements as substantive evidence in connection with Turco's testimony about Marty Motors, and the rule is as I have stated it: A prior inconsistent statement of the time we are dealing with here is not substantive evidence. The only exception to that rule in this circuit, and elsewhere, is that prior testimony under oath can be used as substantive evidence, but we're not dealing withthat here, we're dealing with a statement by Ripperger, according to Mr. Turco.

I might note that in the initial proposed draft of rule 801 of the Federal Rules of Evidence it was proposed that that rule be changed to permit generally the use of prior inconsistent statements as substantive evidence, but the Congress amended the rule.

The conference committee report on the rule so indicates, specifically to prevent the substantive use of prior inconsistent statements, and, of course, the cases in this circuit, both before and after the rule, are consistent with that, and I invite your Honor's attention to the following:

United States v. Briggs, 457 F. 2d 908, decided upstairs in 1972; United States v. Cunningham, 446 F. 2d 194, another Second Circuit decision; and a post-Federal Rules decision in the Fourth Circuit which refers to the Secont Circuit's standard, Martin v. the United States, 528 F. 2d 1157.

THE COURT: While we have interrupted here, can I go back and ask you some questions on things you discussed yesterday. You can either answer them now or have someone look them up. I would like to ask this: In the charts that are marked G9 and so forth for identification, the Chevrolet chart, for example, it shows no purchases of Chevrolets after July 1970.

I think also the Pontiac chart, which is I-9, shows no purchases of Pontiacs after July, 1970.

Cadillac is a little different case. It happens that there were no purchases of Cadillacs after June 1970, but they were pretty sporadic even before then.

On Oldsmobile there are no purchases recorded on these charts after May, 1970.

As far as Buick, no purchases of Buick after July 1970.

I remember in connection with some discussion there was a stipulation about a strike. Did that go across the board at General Motors?

MR. KAPLAN: We are getting that out right now.

This circumstance is accounted for by two different factors.

First of all, we point to the late spring, '70, the end of model year, at which time there is a cessation of production and you can't custom order cars any more. That's a matter of common knowledge.

Secondly, we had the strike. The information on the strike is in Defendants' Exhibit W5 in evidence, a copy of which I'm handing up.

(Pause)

THE COURT: That's right. The stipulation was read.

MR. KAPLAN: Yes, your Honor.

THE COURT: Wasn't there testimony by Anthony Maiorana about going to Sloane Chevrolet?

MR. KAPLAN: Yes.

THE COURT: When was that?

MR. KAPLAN: They went to Sloane after they stopped with Rohrer. Sloane became a dealer during the strike. We have not put the 1971 transactions into the exhibits because it was post the damage period, but I think if we look at Plaintiffs' Exhibit 452, the police book, and the auto log, you will find there were a lot of Chevrolet dealers by Sloane in 1971.

THE COURT: We don't have to go into that.

Any time you want to proceed --

MR. KAPLAN: I'm now ready to go into your question about the books, your Honor.

THE COURT: Let's take the Chevrolet book, E9, and the exhibit J9. I added up the transactions reflected in J9 and I got 148, which could be an arithmetical error, but I did it twice, without a calculator, and I still got 148.

Again, without calculator, I took the two righthand columns in the first page of E9 -- I'm not quite sure where we stand on those columns because there have been some corrections, but I wish you would read the columns as corrected. I think it relates to the '67 figures. Just read the '67 figures as the final version stands, left to right.

MR. KAPLAN: 55, 12, 8, 26, 9, 33, 41 and 67.

THE COURT: If I add the next to the last column on the right, under the minimum, I think I get 154.

MR. KAPLAN: I think you are right.

THE COURT: I thought I was assuming that the chart, J9, would correspond to that minimum column.

MR. KAPLAN: It certainly should.

THE COURT: The second question ss this -- maybe it ties in, before you worry about that for the moment: As we know, there is a category of sheets in Exhibit E9 that are marked with a red asterisk.

MR. KAPLAN: Yes, your Honor.

THE COURT: Those originally were at the back. Tell me what those refer to and what column, if any in the cover sheet, they corresponded to.

MR. KAPLAN: The sheets with the red asterisk are reflected in the cover sheet under the column headed "other deliveries" with no order reflected in Plaintiff's Exhibit 45.

THE COURT: I think I'll put an asterisk and footnote that. I'll put a double asterisk and a footnote. Maybe you could do the same thing in the other book, somebody, later.

At least in the Cheveolet book there are fairly large numbers of orders which have the red asterisk and which don't seem to duplicate any other dates or sheets in the volume.. For instance, in J9, the figure of nine cars purchased from Luby in November of 1966, which you have there, I count up, even with some attempt to avoid duplication, 17.

MR. KAPLAN: I think the problem is this: I don't think you counted 17 Luby cars with serial numbers from the pages of this book. Those are the only ones we reflected on that chart. If you have a serial number you know you are not duplicating it.

THE COURT: That's very conservative.

MR. KAPLAN: We tried to be as conservative as possible about it.

THE COURT: I don't think we need to achieve absolute reconciliation of every possible document, but I think it would be helpful to me to check over these sheets.

Give me a moment now to take care of another matter.

(Recess)

THE COURT: Mr. Zangara suggests we have the jury come in on Monday. They were already alerted that tomorrow would be a motion day.

Apparently, as far as payment of the jurors and so forth, there are some problems. He feels it would not disturb the jurors and they would be content to come in Monday. They will not be able, in any event, to do any appreciable work. Regardless of the outcome of the motions we are not going to have any appreciable amount of evidence tomorrow.

If the motions are granted that will end the trial. I don't know what the outcome will be. In any event, there will not be work for the jury on Friday except to hear the ruling on motions to the extent they should be apprised of it.

I was a little worried about keeping them under discipline, but Mr. Zangara, who has been in touch with them, believes that it's perfectly acceptable to not waste time, and to do the sensible thing, have them come in Monday.

MR. PERSON: I'm in agreement.

THE COURT: What do you say?

MR. KAPLAN: I don't have any problem with that. I would hope that we make every effort to finish up with the motions by the end of tomorrow, in any event.

THE COURT: I think we can do that. I think what this amounts to then is it gives Mr. Person as much time as he needs. It gives me time to collect my thoughts and put a ruling on the record Monday. That's probably the realistic way to handle it.

Is that acceptable to you?

MR. PERSON: Perfectly, your Honor.

THE COURT: Mr. Zangara will make the calls.

(Recess)

MR. KAPLAN: Your Honor, I would like to say this: As we re-add the figures, there is a discrepancy between the two of five cars. We have rechecked all the others and there are no discrepancies in those.

THE COURT: Thank you.

MR. KAPLAN: I was coming to the end with respect to Mr. Turco and East New York.

I think we were just starting on the subject of injury and damages. I would submit there is no proof from which a jury could find any injury to Nabcor of East New York, and certainly no way in which they could find any rational basis to award damages.

To begin with, consistent to what I said before, there is no evidence of lost car sales attributable to anything that the defendants may have done.

Secondly, while Mr. Turco testified in the most general of terms that he had some franchisees under him at one time and not at others, there really is no evidence in the record from which anybody could find that that circumstance was caused by the defendants in this case, and even assuming it were there is no evidence from which anybody could figure out what that meant in dollars to anybody.

Finally, as to franchise sales --

THE COURT: Let's pause on that.

MR. KAPLAN: I think the total of the relevant testimony is on page 2842 of the record.

THE COURT: That's the end of the direct?

MR. KAPLAN: That's right.

He simply said there were on occasions orders that he could not fill. As we have seen, they were few and far between, and that after those incidents some of his brokers, no numbers, no names, stopped doing business with him; so there is no link to any specific orders, th-re is no evidence of who the brokers he's talking about were, there is no evidence of causation, there is no evidence of what kind of income Mr. Turco might have received if these brokers had stayed active, there is no evidence as to what volume of sales they had generated in ths past of might have generated in the future, and there is no evidence as to what that meant to Mr. Turco in profit. So on liability and injury and damages there is nothing there.

On the subject of franchise sales by Mr. Turco, he testified that there were about ten franchises sold in his area, and that to some extent he did not define -- he made some effort, or people acting for him made some effort, to sell franchises.

THE COURT: When you say "in his area," you mean sold by Nabcor?

MR. KAPLAN: He was unclear about that. His testimony is at 2793. He said he had franchise salesmen working for him, and that there were Nabcor franchise salesmen selling his his area, and thathe got a cut of anything that was sold in his area. He said there was a total of about ten sold but it's not clear who sold them.

In any event, there is no evidence in his testimony or anywhere else that he was unable to sell franchises or that anyone was unable to sell for him by reason of anything the defendants in this case did; nor, for that matter, is there any evidence about what direct income he would have received from the franchise sales had they taken place, because I think his testimony was that the amounts they got for franchises varied all over the place and that he didn't really remember very much about them. He gave a number of figures but it's very unclear.

There, of course, is no basis to make any assumption as to what kind of income any of these hypothetical brokers might have generated for Mr.Turco, and rather than repeat any further I would simply say that just about everything Mr. Kleinbard said yesterday about Nabcor's franchise claims and admissions applies in spades to Mr. Turco. There is endless evidence where Mr. Turco is concerned.

That concludes what I have to say about Mr. Turco, and that lwaves me with two other brief points here.

The first is to clear up exactly where we stand on the question of any claims relating to fleets generally that the plaintiffs may believe they are asserting in counts 1 and 3. I don't think they're asserting any, but we may as well get it on the table.

The first possibility that occurs to me is that there may be some kind of claim which the plaintiffs are asserting about fleet certificates. I would only point out in that regard the complaint in this action does not allege that GM fleet certificate was unlawful. The only allegation is that GM refuese to issue a fleet certificate to Nabcor and that that refusal was a part of the conspiracy.

Nevertheless, the plaintiffs conceded in their opening statement at page 30 and again at page 652 of the trial record that Nabcor was never qualified for a fleet certificate and therefore that claim, I think,is by the boards.

I might also point out that your Honor instructedthe jury at page 649 to 654 of the record that GM had a fleet certificate program and no claim was made that that was unlawful and theplaintiffs did not object to that instruction.

I don't think there is a fleet certificate claim here. If there is, I would object to its being asserted because it was never asserted before trial. In any event, I would say we would be entitled to a directed verdict as to any such claim.

Finally, on the question of fleet allotments, once again, there was never any assertion in the complaint whatever about fleet allotments.

I'm reminded of something else about fleet certificates before I leave it. It's rather significant to point outthat the Nabcor fleet certificate application to General Motors, which is the Belcher-Karney episode, takes place in December of 1967 and January of 1968.

The plaintiffs got scads of cars without a fleet certificate before and even more after, and Plaintiffs' Exhibit 699, with the exception of one of these two Corvette orders that we have talked about, the Askew Corvette, doesn't allege any cancelled orders at all after the Belcher-Karney series of meetings. So there could not be any injury by virtue of Nabcor's failure to have a fleet certificate anyhow.

Coming back to the fleet allotment point, no claim was made in the complaint. At some point earlier in the trial I made the statement that it was not asserted in the pretrial brief. I would like to correct that. I have noticed that it was. Nevertheless, I would object to such a claim being asserted this late in the game. That brief was not filed until this case was over five years old.

THE COURT: What cliam is that?

MR. KAPLAN: Some kind of claim against fleet allotments. Mr. Person claims that was unlawful.

THE COURT: There was one day during the trial when Mr. Person was articulating claims and he made this assertion.

Do you have a reference for that?

MR. KAPLAN: We'll find it in a minute.

I don't have it offhand. It was at the end of a day, on a Friday.

THE COURT: Very recently. Or maybe it was on that short hearing we had Friday, that Friday.

MR. KAPLAN: We'll look for it.

Whatever the specifics, and even if the plaintiffs are permitted to assert some kind of claim at this point, there has been an absolute failure of proof of any significant element of a claim based on fleet allotments.

We start with the fact that there is no proof in this record that any dealer ever asked General Motors for a fleet allotment to provide cars for Nabcor, with one exception: The one exception is a letter in March of 1966 from Colonial Cadillac eo the Cadillac zone in which such a request was made.

There are two points to be made about that: First of all, it is stipulated in this record that the Cadillac fleet allotment system required request to be made in the summer preceding the model year and allotments were not changed during the year; therefore the request was most late.

Secondly, it is undisputed in this record that Cadillac never responded to Colonial Cadillac on that request in March of 1966.

Thirdly, whatever happened at that time is now barred by the statute of limitations, so I think we can just eliminate that episode and proceed on the facts that at least as far as the damage period is concerned there is no proof at all that any --

THE COURT: I guess Mr. Person would say that the failure to get the 43 or so Cadillacs resulted from not having a fleet allotment.

MR. KAPLAN: Maybe he would, but the fact is that it's stipulated that for each model year Cadillac went through this allotment procedure which started the summer before the model year, and the request that Mr. Murray made in March of '66 had to relate to 1966 Cadillacs.

THE COURT: Did it?

MR. KAPLAN: Yes. The letter itself, and I think it's Plaintiffs' Exhibit 17 or 18 -- said that Nabcor anticipated buying so many cars in the year 1966, and at the time the letter was sent, March of '66, that was during the 1966 Cadillac model year. It's Plaintiffs' Exhibit 18, your Honor, which is Mr. Maiorana's letter to Colonial which was in turn sent to Cadillac.

He says: We are now beginning to service the account of Allcrest Auto Leasing and we would like tp purchase through your agency 85 to 90 new Cadillacs during the year 1966.

THE COURT: Couldn't the jury find that that was one of theletters that Mr. Murray was gathering to support his allotment for the '67 model year?

MR. KAPLAN: I dont think they could find that in light of the stipulation about the time at which those allotment requests were made.

THE COURT: Give me that stipulation again.

MR. KAPLAN: That stipulation was that the allotment requests were made in the summer preceding the model year, which would for '67 years be in July or August of 1966.

THE COURT: Let's not quibble over the difference between March and summer.

MR. KAPLAN: This was March or the summer, it's before December 10, 1966, and it's time barred.

THE COURT: It seems to me that the point is, is there any showing that --

MR. KAPLAN: There is no showing.

THE COURT: Was there any showing about an allotment period? There may have been talk of an allotment or a letter about an allotment, but I don't recall any evidence as to what allotment Cadillac made or didn't make to Colonia.

I do now recall some stipulation about figures, but right now, sitting here, I don't recall any evidence as to what allotment Cadillac did or did not make for either leasing cars or retail cars for the '67 model year; nor do I recall any evidence that there was any car denied denied Nabcor because of any problem about an allotment.

MR. KAPLAN: You are absolutely right. There are a lot of problems with this claim, if it is a claim, and I was just starting with point one, which is that nobody ever asked for it with the possible exception of Colonial, and we got sidetracked about Colonial. I'll come to those other points in due course.

Certainly as far as the other dealers and incidents alleged that are involved in this case, according to the plaintiffs, there is not a shred of evidence that anybody even asked General Motors for a fleet allotment. Nothing whatsoever.

As a matter of fact, Mr. Berg's testimony --

Mr. Berg was the fleet manager at Chevrolet -- was that in the period from July '69, when he became the head of fleet sales for Chevrolet, and thereafter no one, to his knowledge, requested a fleet allotment for Nabcor and there is no evidence to the contrary about any of these.

The second point about allotments is that it is absolutely undisputed on this record that fleet allotments are of absolutely no significance except where you are dealing with a shortage situation. Mr. Brock so testified at page 3410 inthe portion of his deposition that was read in, no evidence to the contrary, and there is no showing with respect to any of the cars that the plaintiffs failed to get, or claimed they failed to get, that we were dealing with that sort of situation. There is no proof.

Still another point here is this: The evidence in this record again is undisputed that it was General Motors' intention that the dealers handle relatively small orders out of their regular allotment irrespective of whether the cars were going to fleets or to leasing companies or anything else. There is testimony to that effect on page 3426.

I think the charts that are J9 and so

forth, that your Honor has, which show deliveries to Nabcor, show something very important. They show that on a month to month basis no matter how many cars Nabcor was ordering overall -- and it was not a lot -- this was a one and two operation. Very rarely do you find as many as ten cars of a single make delivered in a single month. There was absolutely no need for fleet allotments to deal with Nabcor. It was a small volume account.

It's worth pointing out one thnng that all this focus on Nabcor, your Honor, kind of obscures. We are kind of looking under the microscope at something. Mr. Dillon of Ruckle Pontiac testified that he sold 2000 new Pontiacs a year.

I grant you he's a large dealership, but it's worth noting in four years or four and a half years Nabcor sold something like 400 General Motors cars of five different divisions, or an average of 80 per division, or 20 per make per year. That is a fly speck. It is so much smaller than the smallest dealers that it's not even funny. This was not a fleet situation. This was not anything for anybody to be concerned about.

Another point about fleet allotments is that there is no evidence whatsoever that any dealer was unable to get cars to sell to Nabcor.

Mr. Dillon testified he got all the cars he wanted. Madden saidRohrer Cheveolet got all the cars it wanted. There is not a scrap of evidence to the contrary either about those dealers or anybody else in this case.

With respect to the Colonial Cadillac situation, Mr. Murray testified that he did sell to leasing companies out of his regular allotment. He said that at page 1893 and again at 2084 and 85.

The stipulation which we read into the record on the statistics about the Colonial allotments shows that most of the cars they sold to leasing companies over the years came out of their regular allotment and not this special rental and leasing allotment.

Indeed, they did sell two cars to Nabcor. There is no showing that Colonial did not sell to Nabcor because of anything connected to a fleet allotment. Absolutely none.

Let me deal with the hypothesis -- because I think this is a tempest about nothing -- that there were occasions when Nabcor went to a dealer and said

"We want X number of cars" and the dealer turned around and said to General Motors "We would like X number of cars in addition to our regular allotment to sell to Nabcor."

And let's assume further thatGeneral Motors said "No, we don't want to give them to you; we don't want to give them to you because Nabcor is going to resell them and we think that's bad for the business."

THE COURT: Is there any evidence of that?

MR.KAPLAN: None.

I would like to cite two cases to your Honor, or three. It would be absolutely lawful if it happened. It would be a unilateral refusal to sell under Colgate, and the two additional cases I cite are these. First of all a case called Weather-Wise against Aeroquip, 468 F. 2d 716.

This is a case where a manufacturer of components for air conditioning units announced that it would sell those units only to people who were going to use them in manufacturing air conditioners and they would not sell them to resellers; and, indeed, they extracted commitments from the persons to whom they did sell that the components wouldnot be sold to resellers. The Fifth Circuit held that was absolutely lawful.

I would also note the Third Circuit's decision in Triple E Corporation vs. Weller, which is 425 F. 2d 932. That was a case in which a manufacturer of beauty products for professional use only to the trade and restricted the resale of those products into retail channels. The Third Circuit said that was lawful and there is a paragraph which I would like to quote because it's very relevant right here.

The Third Circuit said: We are unconvinced that the Supreme Court intended, for example, that an automobile manufacturer using wholesale intermediate sellers must permit distribution of automobiles through beauty parlors or barbershops rather than through dealers offering presale wholesale services.

I think the reasoning of Triple E would apply here if there was a factual predicate. There is not. I think any claim relating to fleet allotments has to be dismissed.

We have left open two small items and I'll note that fact and come back to them after Mr. Person and Mr. Weissberg make their motions. One is a piece count 17 and the other is GMAC. I'll conclude at this point.

Mr. Weissberg, I think, has a motion on behalf of Paragon Oldsmobile.

MR. WEISSBERG: Good morning, your Honor.

THE COURT: Good morning.

MR. WEISSBERG: At the beginning, your Honor, I would like to move to dismiss the complaint against Paragon insofar as all of the plaintiffs besides Nabcor are concerned since there is no evidence introduced by any ot the other plaintiffs against Paragon, and the only evidence against Paragon was introduced on behalf of Nabcor. So since there is a complete failure of proof as to any of the other --

THE COURT: What do you say to that?

MR. PERSON: The conspiracy, if there is a conspiracy, affected all the people and they would be charged with the activities of the others.

THE COURT: All right. Go ahead.

MR. WEISSBERG: Your Honor, I would also move to dismiss the complaint against Paragon by Nabcor on the ground that the plaintiff has failed to introduce any evidence upon which relief can be granted.

The evidence introduced against Paragon was the testimony by Mr. Maiorana on page 226 in which he stated that Paragon Oldsmobile sold cars to

Nabcor.

He further testified, at page 228 and page 229, that Paragon refused to deliver cars or not deliver cars to Nabcor.

However, missing from the record is any evidence that Nabcor placed any orders with Paragon Oldsmobile during the period December 1966 through December 1970. The evidence submitted by the plaintiff, namely Exhibits 451 and 452, the police book, indicates that there were no transactions with Paragon.

Exhibit 450, which is the log of automobiles, indicates that there were no transactions whatsoever with Paragon.

Then in their Exhibit 699 there was again a complete absence of any evidence that there was a failure to deliver any cars from Paragon.

The only evidence introduced by the plaintiff with regard to Paragon and a specific transaction was in Exhibit 591, which states that an order for a new car was placed on May 18, 1966. That is prior --

THE COURT: Do you have the exhibit with you?

MR. WEISSBERG: Yes, I do, your Honor. (Handing)

(Pause)

THE COURT: Proceed.

MR. WEISSBERG: That one transaction reflected on that exhibit is time barred as prior to the damage period. During the damage period the plaintiff exhibits contradict the testimony of Mr. Maiorana that there were orders placed with Paragon which were not filled. But even assuming that what Mr. Maiorana said was true, for the sake of argument, the complaint should still be dismissed because the plaintiff has not testified, the plaintiff has not introduced any evidence, that there was any damages to Nabcor in not being able to obtain Oldsmobiles during the damage period.

The record shows quite the contrary, that Nabcor was able to obtain all of the cars, Oldsmobiles, it wanted, and there is no evidence in the record that Paragon failed to deliver, or refused in any way to deliver, any ordered cars from Nabcor and therefore there was no injury to the plaintiff; and, more important than that, there is no damage where there is no evidence that the defendant did not deliver a car or that plaintiff could not obtain a car from some other source; there could be no damages to the plaintiff as a result of anything which Paragon might have done and therefore the complaint should be dismissed as to Paragon Oldsmobile.

THE COURT: What about that, Mr. Person?

MR. PERSON: I could answer it briefly now but I think it has to be taken into context.

THECOURT: I think this is a situation where you've got one document, May 18, 1966, reflecting an order from Paragon. This apparently was before the log was kept and didn't get into the log.

Now the log started to be kept in the summer of '66 and there is not a thing in the log about an order being placed with Paragon. There is nothing in your exhibit 699 about an order being placed with Paragon and being refused; there is nothing anywhere.

All that you have that could possibly fit within the limitation period is this testimony of Mr. Maiorana, and he simply says that he had some conversation and he dates it in December of 1966.

Well, we aer a long way past this general testimony. We have dealt with records and documents, and I really wonder how something stand up when all you have got is a piece of testimony which even taken literally could be sometime in December and it's not specified. That's absolutely all you have got.

MR. PERSON: Here's the answer to that. Number one, the witness said early '67, if I am not mistaken.

THE COURT: You find it. You have had the testimony.

When was this approximately? In December of '66.

I don't know. Maybe he changes his testimony. I don't know.

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MR. PERSON: Let's just take that, and it is not crucial, your Honor. We maintain that Paragon Oldsmobile became a conspirator earlier than the damage period. That occurred by the acceptance of an order and the non-delivery of the order.

THE COURT: I see, 236, he was asked when did this conversation take place, and he answered December, 1966, the early part of January, around December.

MR. PERSON: And so whether it was within or without the damage period, Paragon became a co-conspirator at that time. The question of an automobile within the damage period, I am not going to maintain that there was --

THE COURT: Or any order?

MR. PERSON: No. There may have been an order, but I haven't --

THE COURT: May have been is not evidence.

MR. PERSON: There was an order prior to the damage period.

THE COURT: What about in the damage period?

MR. PERSON: No, that letter was dated in May. I believe the order was subsequent to May.

THE COURT: Is that the only order to Paragon?

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MR. PERSON: Apparently there was only one, although the testimony may be several. I don't maintain there was more than one order.

Subsequently an order was not obtained, and I will even stipulate probably was not obtained prior to the beginning of the damage period. I am not going to maintain it was within the damage period,. because it isn't clear in this case.

Nevertheless, in 1969 Mr. Maiorana had a conversation with the owner, Goldsmith, of Paragon in New York, and he had said and confirmed at that time the reason for it.

THE COURT: Have you read the record on that?

MR. PERSON: I don't have it quoted from the record, I have notes.

MR. WEISSBERG: Here it is.

THE COURT: What about this 1969 conversation?

MR. PERSON: Page 243, line 22.

THE COURT: What about this, Mr. Weissberg?

MR. WEISSBERG: Your Honor, even with this conversation, I still don't think the plaintiff can maintain a case for the simple reason there is no evidence that an order was refused. One of the essential elements is injury to the plaintiff in an antitrust case.

If the plaintiff never submitted an order to Paragon and Paragon never refused to fill the order, then the plaintiff has not set forth a case of an antitrust violation against Paragon.

One step further than that, if there is no order refused by Paragon, how can there be any damage to the plaintiff?

THE COURT: What if somebody just says, "Don't give me any orders"?

MR. WEISSBERG: He doesn't say he gave an order. The conversations that were testified to by Mr. Maiorana were initiated by Mr. Maiorana. He called Paragon Oldsmobile, he called Victor Goldsmith, and that is clear in the testimony, and if he during these conversations did not place an order, then there was no refusal to fill an order.

He initiated the conversation and said, as I recall the conversation, when he called him, he called him to have a conversation with the man, he did not call him for the purpose of placing an order.

There is nothing in the record that shows that Mr. Maiorana wanted to purchase a car from Paragon,

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except for one car, which is on May 18, and thereafter there is no transactions with Paragon within the damage period other than a few conversations, but these conversations don't help the plaintiff because there is no injury to the plaintiff as a result of these conversations.

MR. PERSON: There is only a conversation confirming a conspiracy, and the fact of a request --

THE COURT: Where is the evidence? Look, I won't limit damage to Nabcor to simply a conversation where Nabcor literally placed an order, and that was refused. If Nabcor had an order for an Oldsmobile and went shopping around to Paragon and said, "Will you take this order?" and Paragon says, "Don't come in the door," well, that might be something.

But I don't even have that kind of evidence. Where is the evidence that Nabcor had an order for one or more Oldsmobiles that they couldn't get because Paragon didn't give them? Where is the evidence?

The evidence would be in the log, that they received an order from Nabcor and couldn't fill it. Where is it?

MR. PERSON: What we have and maintain is that there was an overall conspiracy, of which Paragon was a member, and that they had rejected orders previously either within or without the period. I am not going to debate that point, it is not critical as far as I am concerned.

THE COURT: The idea is they rejected it May 18?

MR. PERSON: They rejected that order. That is the testimony.

MR. WEISSBERG: There is no evidence whatsoever that the order was rejected.

THE COURT: Certainly no evidence --

MR. PERSON: There is no documentary evidence. We are referring to the testimony of Frank Maiorana about placing of the order and the inability to get them.

THE COURT: He doesn't say that they refused the order back in May, 1966.

MR. PERSON: He said that Nabcor ordered a car.

THE COURT: Where?

MR. PERSON: Page 227.

THE COURT: Page 226, you showed him Exhibit 591, the letter from Nabcor to Paragon dated May 18, 1966.

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You really didn't ask him whether that was turned down. You went on then to say,"How many orders in total did you receive or place." He said, "Just a few." He said, "I don't recall the amount of the orders." He says, "I know that we bought just a few cars from Paragon," page 226.

Then you asked him, "Did there come a time when Paragon refused to deliver automobiles," and you get into that December conversation, so-called December-January conversation.

MR. PERSON: I have 229 at line 13.

THE COURT: That is the so-called December, 1966, or January, 1967, conversation.

I am going to dismiss the complaint against Paragon.

MR. PERSON: I request that that be held up pending the others. I think that it is premature and I didn't prepare for this at this time. I want to take it in my order, and I am sure there are things which need to be considered by you. Maybe you will find grounds later, but at this moment --

THE COURT: I am dismissing as to Paragon.

MR. PERSON: I object to it.

THE COURT: It seems to me this is so utterly

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peripheral and there is no evidence whatever, no claim in 699 for identification documents or elsewhere of any Oldsmobile order which Nabcor had received and what it was unable to place because of any dealer, including Paragon and specirically Paragon.

In 699 there is a reference to only one Oldsmobile as being an alleged problem. That was Order 322 from Rosenstock Oldsmobile, and there is no evidence in connection with that single transaction to tie any wrongdoing whatever to Paragon.

All we have about Paragon conceivably within the damage period are two alleged conversations testified to by Mr. Maiorana, but they do not rise to the minimum of showing lability and damages on the part of Paragon. That is, that somebody, that Nabcor or one of the other plaintiffs had some car which they tried to place with Paragon, and it was refused, for for some other reason were unable to buy because of conduct of Paragon.

MR. PERSON: Nabcor went there as a source of supply, and there was no --

THE COURT: I have ruled.

MR. PERSON: I am just saying that I haven't finished, I am not arguing the whole case at the moment.

as to Paragon, but I am just alerting you to make sure that you understand I am not finished arguing that point, and I am going to handle it as I handled the other points, since it is more than just one car.

I think you are going way off in assuming I have to show there was one car and can't show an inference about the source of supply generally is not damage. I think you are wrong in concluding that, if that is your conclusion.

THE COURT: That is my conclusion on Paragon. We have a lawyer from Paragon who is in court right now, it is the most peripheral defendant and the case is dismissed as against Paragon on behalf of all plaintiffs who are suing Paragon. That is that.

Anything else?

MR. KLEINBARD: We are through, your Honor.

THE COURT: Mr. Person.

MR. PERSON: I am going to start by pointing out at the beginning of the dealings that GM had with Nabcor and referring to a few documents which sort of set the tone of General Motors as far as Nabcor is concerned.

I merely want to alert you to these documents, and I am not going to read from them unless you wish to

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have me make reference to these documents. The document numbers are 288 --

THE COURT: It does me absolutely no good to read document numbers, none.

MR. PERSON: Fine, then, your Honor.

At the very beginning back in 1966, Nabcor advertised for automobile distributors, and this information was picked up by GM and a copy of the ad was set forth in one of these memos and discussion of Nabcor's business in part was included within that Exhibit 288. It was sent to Messrs. Donner and Roche. They were the chairman of the board and president of General Motors at the time.

Also, this is before Nabcor started ordering any cars, they had made several locates, but at this point they had not yet --

THE COURT: 288 is a copy of the ad?

MR. PERSON: The document which shows the ad and has other material in here.

THE COURT: It contains a copy of the ad and describes Nabcor.

MR. PERSON: It talks about what Nabcor was doing, special fleet prices at $50 per car, and it is from the Public Relations Department of General Motors that went up to the office of the president and chairman of the board on June 7, 1966.

Then Mr. Feely and Mr. Crawford, officials of GM on June 17, 1966, commenced an investigation of Nabcor by that time, asked the general counsel for General Motors, actually performing an investigation of Nabcor by that time, and also it is evident from the documents that Al Power, the general counsel of General Motors, had been involved in connection with Nabcor.

There is a report on what Nabcor was doing, they would offer cars at $15 to $20 over the dealer's invoice, and it is easy for Nabcor to acquire cars from many dealers participating.

It even indicated that Nabcor got three Chevrolets at a price of $90 over dealer's invoice. I don't mean if they mean $30 per car or what.

But Nabcor was endeavoring to sell or lease new cars which they purchased, so General Motors was acquainted with the method of doing business.

THE COURT: These people you mentioned, Mr. Roche and Mr. Donner, you have top officials and other people involved also at that time. Is it General Motors' central office or connected with a division or what?

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MR. PERSON: The staff of General Motors.

THE COURT: You would conclude that would indicate that the people fully knew about Nabcor's method of operation?

MR. PERSON: Correct, your Honor. The documents, I think, are clear in that respect. In fact, another person, Mr. Foley as distinguished from Mr. Feely, wrote to O'Connor on June 14, 1966, and O'Connor was a high official of the Chevrolet Division.

Exhibit 400 indicates that the advertising of Nabcor in The New York Times on June 6, 1966, was followed by General Motors and Chevrolet itself had an investigation of Nabcor.

THE COURT: What do you say these people did? I know there isn't any express evidence, but there doesn't need to be. But do you have any claim or contention that this evidence showed anything they did? I mean, did they, do you claim that the evidence shows that at any time there was a direction given to all divisions or one division or more than one division, and when did that occur?

MR. PERSON: May I get to that in just a little while? But this thing is background and it is useful. I will get to that very shortly.

THE COURT: As we all know, and it is no surprise to anybody, those documents in and of themselves don't mean much. The question is, was there any illegal follow-through done?

MR. PERSON: I understand, your Honor. I am focussing on this background, it is useful here.

THE COURT: Of course it is.

MR. PERSON: It was known, for example, as a result of this Exhibit 400, the same letter as of June 14, 1966, Nabcor was recently in financial difficulty, so immediately at the very beginning General Motors is aware that Nabcor is in financial difficulty.

The last paragraph here talks about a more extensive investigation possibly having a representative of the division contact an employee of Nabcor, but they were sensitive to doing that, possibly because of the Senate investigation and Mr.Roche's testimony.

Then Exhibit 287, information was given, there was a request to give Mr. Roche a report on Nabcor, and that was on June 20, 1966.

That is where Mr. O'Connor having received a copy of that, there is a letter from Mr. Crawford to Mr. Feely.

Then in June of 1966 information was received

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by Mr. Foley, who was in the Sales Section of Detroit, that is a staff function of General Motors, servicing all of the car divisions.

Mr. Foley received from the Pontiac Division information about a complaint about Nabcor that had been received in the Eastern Regional Manager of Pontiac.

There was a report received from a Pontiac dealer in Newburgh, New York, and the Newburgh Dealers Association is up in arms about a Nabcor franchisee, concerning the $5000 franchise and referring to the brokers as parasites.

3 This was referred to the Sales Section through the Pontiac Division. This was in June, 1966, Exhibits 402 and 403.

Also on June 24, 1966, Exhibit 79, there was Mr. O'Connor, who is stating that he had checked the company known as Nabcor with the Fleet Section of General Motors and the Fleet Section records and told Mr. O'Connor some time later and this is by June 24, 1966, that the information in the records revealed nothing on Nabcor. Nabcor is not a GM fleet certificate holder and the Fleet Section has no record of communication with Nabcor.

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I think that is significant because there is a claim throughout the case by defendants that the fleet certificate has no meaning, that it doesn't add up to the right to buy cars, and that is something that we contest quite vigorously, and I think I can demonstrate through the evidence that we have already put in, and I am not suggesting more needs to be put in, but we have put in evidence that the fleet certificate is a license to buy cars, and that is in essence the white list theory, your Honor.

The letter from Mr. Pratt is referred to.

THE COURT: Are you going to return to that argument later?

MR. PERSON: Yes, very much so. I just want to go into the background, and there will be more argument, and there was an awareness immediately that the fleet certificate is meaningful even to Mr. O'Connor.

THE COURT: Meaningful in what way?

MR. PERSON: It implies how can a person be selling cars if he doesn't have a fleet certificate?

THE COURT: Really?

MR. PERSON: This is the implication from a High official of GM when he found out --

THE COURT: May I see it?

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It says two things, they are not a General Motors Fleet Section certificate holder and there is no record of any communication with the company.

MR. PERSON: I am just using this as background, it is just a little bit. But the fleet certificate doesn't mean anything. It does seem strange that a high official immediately checks up to see if they have one when it is frankly in the business of reselling cars.

MR. KAPLAN: I don't know if it is appropriate --

THE COURT: No, let's not have any more.

MR. PERSON: Then Mr. O'Connor has a memo to his files, June 29, 1966, Exhibit 401, in which he refers to this letter from Pratt and attaching the letter from the Pontiac dealer, including also a credit report on Nabcor and indicating that Nabcor started with $35,000 and now has four agents with a target of approximately 50 agents in the first year of operation.

This is background information where Nabcor is forwarded to what is the highest official in GM and they are now aware. On July 1, 1966, a letter is sent from Mr. O'Connor to Mr. Roche, president of General Motors. He is acting at the suggestion of Mr.Crawford, attaching some information that he obtained relating to Nabcor and indicating that one of the prior exhibits from Wetzel that prompted this call, this communication. That was Exhibit 288. This is in September, 1966, a law firm inquires about Nabcor, this is 148 and 149.

This law firm wrote to General Motors in Detroit in an attempt to determine whether GM will sell its cars directly to Nabcor and whether to your knowledge Nabcor would be in a position to deliver your cars at discount prices.

This matter was referred to the general counsel, Mr. Power, with a copy to Mr. O'Connor once again, and on September 26, 1966, the Legal Division of GM responded to the lawyers indicating that they have no knowledge concerning Nabcor and GM sells its cars only to authorized GM dealers.

That certainly is a misleading statement, since they did have knowledge of Nabcor.

Then, just to take it another way, going one year later, so I can just clean this up and not have to refer to it again, there was some correspondence from Martin Chevrolet in August, 1967, to its own Chevrolet zone, and this zone manager --

THE COURT: What zone is that?

MR. PERSON: In Cleveland, and the zone manager forwarded information to Detroit which went up to the Sales Section and the Sales Section once again is the overall staff function for General Motors, not limited to Chevrolet.

The information that was forwarded by Martin Chevrolet was a copy of an advertisement in the Youngstown Indicator of August 13, 1967, offering a franchise, together with a four-page analysis of Nabcor, which is Document No. 399 -- the advertisement, by the way, is No. 398, and the other two relevant communications are 396 and 397.

The dealer said this communication that he forwarded to GM was something he had received, furnished to him by the Bureau of Motor Vehicles in the State of Ohio. If you have any questions, contact the Registrar of Motor Vehicles in Ohio.

This four-page analysis of Nabcor is one which I don't want to read because I read it into the record, but it does give some very glowing description of Nabcor and the dire effects it would have on franchisees.

It is a fairly good summary of what Nabcor was doing and makes it clear that they had various

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advantages over the franchisees.

I don't want to belabor the point. This is just background. The most important thing, I believe, that we have here is it ties in with the fleet certificate and what has happened to Nabcor and its franchisees.

THE COURT: When you say the most important thing --

MR. PERSON: This is an integral part of the entire case.

THE COURT: I am interested in the words "the most important."

MR. PERSON: It is a very important part, your Honor.

THE COURT: Is it the most?

MR. PERSON: It ties in.

THE COURT: I don't want to get into an argument with you, but I would be interested if you believe now and in view of the evidence that it is indeed the most important part of the case as was argued based on the fleet certificate in relation to the fleet allotment or something else as described.

MR. PERSON: Yes, in relation to the --

THE COURT: I want to know the issues that you think remain as important issues. I want to know what you think are subsidiary or less important. I want to know any claims you are dropping. It is important for me to know what you think is important.

MR. PERSON: I understand there are two main features to the case --

THE COURT: I don't want you to forego anything that you think important.

4 MR. PERSON: I am trying not to forego anything because I am sure I will do a lot of foregoing voluntarily along the way.

I want to make it clear that there are two lines. One is the white list and the other is the black list, only for the purposes of convenience, and I do want to refer to it that way. The white list is the fleet allotment and fleet certificate and the tie-in and the reasons for dealers taking certain action along the way.

The other one is the black list, and that is where there is a statement, where the dealers refuse to sell to Nabcor and to integrate it along the way. It is hard to separate them, your Honor. It is background because it is not even arguable as to the fact there isn't such a fleet certificate and fleet allotment and the effect of it.

THE COURT: The thing is, I think you are right, that there is no question that Nabcor never got a fleet certificate.

MR. PERSON: Never qualified for it, either.

THE COURT: If the case is about that, that is not a jury issue, you have won.

MR. PERSON: I know, I would like to move for a directed verdict, if it is possible, for liability only. I think it is going to be clear that there is a non-triable part to the case.

THE COURT: I am certain that on that issue you win, because there is nothing to even talk about. But, of course, as we all know, it is a question of what is the significance of that.

MR. PERSON: I want to point that out now, I can show what happened from the evidence that we have in the record. I have gone through it painstakingly and I have the evidence on that.

So I am making a motion for a directed verdict, if it is possible, for liability only. Is it possible to have a directed verdict as to liability only? I assume it is.

THE COURT: I suggest that you look at the rules.

MR. PERSON: I looked, and it doesn't say.

THE COURT: State your position what you think.

MR. PERSON: I would assume you have to be able to --

THE COURT: This is not a quiz program.

MR. PERSON: I honestly did look at it and it isn't clear but it does refer to motions by all parties and I can see a situation where the element of liability is not in dispute.

THE COURT: If there is some issue which does not deserve to go to the jury, you can have the Judge issue an instruction to the jury. That is an issue that is not for them to consider and only submit the issues where there is something. But I have your motion, you are moving for a directed verdict on the issue of liability, reserving to the jury the subject of damages.

MR. PERSON: That is correct.

With respect to this white list, I am now going to spell it out.

Through its fleet alotment or otherwise known as the fleet reserve, and as to Cadillacs, the leasing allotment, and these terms are all interchangeable terms with respect to Cadillac, GM made a supply of cars available to its dealers only if it sold the cars to persons either approved or qualified as fleet accounts or fleet purchasers. Those are interchangeable terms under GM's own rules.

THE COURT: Say that again.

MR. PERSON: That General Motors will make available to its dealers to sell cars through fleet allotment, using that term and only that term, I hope, but it is interchangeable with other terms that I stated before.

That GM will make its fleet allotment, make cars available to its GM dealers through the fleet allotment only to dealers selling these cars to persons who are approved by GM for the purchasing of these cars. They either must be approved or qualified by meeting requirements set up by General Motors. These people are known as qualified purchasers or fleet purchasers.

THE COURT: You made a statement which is important, you said that -- let me see if I am understanding you -- your position is that General Motors will make cars available under fleet allotment only to dealers selling to so-called approved buyers?

MR. PERSON: That is correct.

THE COURT: Approved buyers.

MR. PERSON: I want it clear from the outset that that has not been the fact as to each and every car sale. I am not saying it was followed precisely one hundred per cent, but it is a policy that is there and has been effective, so it is not that I can't prove whether the specific car may not in fact be granted from the fleet allotment, according to the rules, but I am claiming these rules existed and were applied and did have effect on Nabcor, although it was not applied one hundred per cent of the time.

I don't want to mislead the Court. I am not maintaining a claim of uniformity one hundred per cent, but it is there to a substantial extent.

The approval by GM was given only to companies which purchased and registered in their own name, either 10 or 20 or more cars of any make or model per year, with the additional qualification that companies actually used their cars in their own respective businesses, and that has developed with our familiar formula as being a user, as to a rental or leasing company.

MR. KAPLAN: May I have the record references if Mr. Person thinks there is one?

THE COURT: Please.

MR. PERSON: This is just an analysis of the record. I have record references, and I am trying to state what I intend to prove.

Your Honor, this National Account List, which is 626 in evidence, is a familiar book that we dealt with from the beginning of the trial and is a list of each company, either a user or a leasing company with 10 or more cars registered in its name, and this has been compiled by the Fleet Section from R.L. Polk statistics, purchased by GM.

This became clear from the evidence, I am only summarizing, your Honor, and during the model year 1967 through 1970, companies qualified for General Motors fleet plans, and essentially that means fleet rebates and other financing plans for GMAC, this was the minimum number of registrations that was needed in order to qualify for a fleet plan, 10 or more.

Except in 1967. In 1967, which happened to be the first year that GM had any fleet plan, the number of registrations required with the same type of use in

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order to be able to obtain a fleet plan was 20, and that just happened to be exactly the same requirement that a company needed in order to get a fleet certificate during that year and the preceding years.

So at all times General Motors has required 20 or more registrations for a company to obtain a fleet certificate. Persons who had qualified for a GM fleet certificate at all times qualified for GM's fleet plans from '67 to '70, the only years these plans were in effect, that is the model years.

The fleet certificate isthe successor to a fleet agreement, a GM fleet agreement in which qualified fleet accounts were required to agree with GM that they would purchase cars in their business for six months, and they agreed not to resell these cars as new cars during that six-month period.

THE COURT: These are so-called fleet agreements?

MR. PERSON: That was the fleet agreement. That preceded --

THE COURT: Was that in effect during our period?

MR. PERSON: But the reference to it will come out by virtue of the understanding that people had, even Mr. Olson, the head of the fleet section, referred to the fleet certificate twice as a fleet

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agreement. This is just evidence as to what the meaning of the fleet certificate is, and I'll get to that evidence, but the origin --

THE COURT: General Motors is liable because its dealers made a mistake?

MR. PERSON: It's not a mistake.

THE COURT: A fleet user had to agree not to resell the cars?

MR. PERSON: You could not qualify for the plans unless you had used the cars.

THE COURT: You are talking about somebody having to agree not to resell?

MR. PERSON: To get the fleet rebate they had to make the representation, yes, so that prior to the end of the use of cars, they were making a representation that they would not resell the car, yes.

THE COURT: Is that right, Mr. Kaplan?

MR. KAPLAN: I would like to look at the exhibit. It certainly is not right as to fleet certificates or fleet allotments.

THE COURT: It seems to me we are just going off. I can see practically Arkansas when I want to get to Florida. I feel as if I'm just being taken through many, many paths here.

Nabcor never complied with the thing?

MR. PERSON: That's correct. We never met the requirements to be issued a fleet certificate.

THE COURT: Obviously other people did; whatever those requirements were. Maybe Nabcor got fleet rebates. Other people did. I assume that hordes of other people complied.

MR. PERSON: We were not looking for a fleet rebate. That's not in issue here.

THE COURT: I'm glad you were not. You should not have gotten it.

MR. PERSON: I don't really agree in terms of other parts of the complaint; I'm merely saying for purposes of count 1 I agree with you for count 1, but maybe Mr. Kaplan can clear it right now and stipulate that the fleet allotment was not available to any dealer that wished to sell to Nabcor for purposes of resale by Nabcor. Maybe he can clear that matter up.

THE COURT: Say that again.

MR. PERSON: That fleet allotment was not available to dealers, GM dealers, who wished to sell cars to Nabcor for purposes of resale by Nabcor.

THE COURT: So?

MR. KAPLAN: I want to make it clear we will not stipulate to that. I think we made a stipulation with respect to Cadillac. Whatever the record says it says. We don't stipulate that --

MR. PERSON: Why not?

MR. KAPLAN: You are the plaintiff. You have the burden of proof.

MR. PERSON: There is a dispute here.

THE COURT: I don't know what it means to the case. I'm very, very concerned about spending hour after hour just going off into nether nether lands.

MR. PERSON: It has a lot of significance.

THE COURT: Let's get to the facts of the case. If you could show me a specific deprivation of business opportunity in any way, shape or form that affects this case and you can show me that it was caused by other people having fleet certificates and Nabcor not, or something like that, I would be most happy to hear it. Let's get to the facts.

MR. PERSON: The white list that I'm talking about is represented by either the people who are in this book or any predecessor book, that is Exhibit 626.

THE COURT: I'm sorry but there are terms in this world that have no meaning to me, and before this case started I had never in my life heard of the term "white list." I have heard of the term "white" but not "white list." What is it?

MR. PERSON: The white list is the reverse of a black list. The black list is a common term in the law. I don't have to define it for you. Maybe we can agree on what a black list is.

THE COURT: I think I know that.

MR. PERSON: The white list is where instead of listing people on a list you can't sell; it's listing on the list people you may sell to and nobody else.

THE COURT: Nabcor was --

MR. PERSON: Not on the list.

THE COURT: Then Nabcor should not have been able to buy a car.

MR. PERSON: Nabcor was not on the list and therefore the dealers were not permitted to sell the cars to Nabcor through the fleet allotment.

THE COURT: So?

MR. PERSON: We maintain it's highly legal.

THE COURT: What does that have to do with this case? When did Nabcor need to be treated under fleet allotment? Show me an order that they could not fill because of a fleet allotment problem.

MR. PERSON: May I develop this? I have these instances where the method of ordering by the dealers was affected because of this.

THE COURT: Let's get to it. If you are going to talk about this fleet allotment and a white list problem, it's all very interesting, but my continual concern is whether it has anything to dowith this case. Give me a for instance.

MR. PERSON: Could I just say a little bit more in order to set the framework for this because I will --

THE COURT: I'm worried about the framework. I am worried we'll never get to the facts of the case.

MR. PERSON: We are getting to it very quickly. I developed this thing on a logical basis and I would like to present it to you.

At least it will be consistent on appeal because, as all of us know, that's where we're heading. I want to set itout as clear as I can as to what my position is.

You look worried or something.

THE COURT: I don't know that this is necessary for a record on appeal. Hopefully you are very lucid in your presentation. The only thing is I keep saying that I want to obviously know how these theories apply.

MR. PERSON: I will show you. The next page is Mr. Stewart's testimony. I'm almost there.

THE COURT: All right.

MR. PERSON: Although these fleet allotments were established by the divisions of General Motors, the five divisions and the zones, the General Motors zones, the criteria used to determine which purchasers qualified for the fleet allotment were established by the fleet section, which is that staff function in Detroit. They determine who qualified for the fleet allotment. Through its requirements for the fleet certificates and the fleet plans, that's themethod by which the definition was made of who was on the white list.

THE COURT: What does the white list -- is it a list? Is it that book you have?

MR. PERSON: This is the white list

(indicating).

THE COURT: That is the entire white list?

MR. PERSON: That plustthe fleet certificates. The list of holders of fleet certificates, those who own or qualify for fleet certificates and those who appear or qualify to appear in this national account list, are the people who have the right to take down cars on the fleet allotment.

THE COURT: The white list equals exhibit --

MR. PERSON: 626, plus people that are not in it who qualify, and the qualifications are set forth in the front page.

Mr. Kaplan has read that front page several times; that is, ten or more registrations. So it is people that belong in here, either the commercial part or the back part. Remember Ruckle? RAR was in here. Mercer is in here. These people are listed in the book. The other part is the fleet certificate, those people who have or qualify for a fleet certificate. Those are the boundaries for this white list.

In order to be able to activate the fleet allotment the dealer was required to communicate with the zone and that is where the problems for Nabcor began. In fact, the book says: Other companies not included in this book may become qualified under the plan; if assistance is needed in determining whether a company not included in this book qualifies, please contact your zone office.

THE COURT: Nabcor never qualified. It was not a matter of whether they were kindly or malicious or liked them or disliked them, Nabcor never qualified.

MR. PERSON: Qualified for what?

THE COURT: The fleet certificate.

MR. PERSON: But the fleet certificate was the license to take down the cars from the fleet allotment so that those dealers wanting to sell cars to Nabcor out of the fleet allotment were not allowed to do so.

THE COURT: Did any seek to and fail to?

MR. PERSON: Yes.

THE COURT: Ketp in mind that question, if you would.

MR. PERSON: Stewart's testimony, I have some key points marked off. All of this testimony I'll summarize if it's in.

THE COURT: Which phase of his testimony are you talking about?

MR. PERSON: I extracted from his whole testimony things that support my argument. Mr. Kaplan and Mr. Kleinbard should have done this for me, but I didn't hear anything like this. I would have thought they might have made the arguments for me and then torn them apart, but they're forcing me into making the arguments.

THE COURT: You are forced. Go ahead.

MR. PERSON: Page 801 -- it won't be in dispute. I will run through a few things.

THE COURT: I would be interested in following Mr. Stewart's testimony.

MR. PERSON: Page 801: General Motors usually sends to Stewart the updated national account list. He receives this list from General Motors.

Stewart's market --

THE COURT: He says he usually gets it.

MR. PERSON: 802: I asked him what he thought his market was for fleet and he said the market was determined by General Motors and all of the manufacturers' classification of fleet accounts, commercial users; anyone who purchases 20 or more cars per year were classified as a fleet account, and that, incidentally, is a reference --

THE COURT: I wish you would distinguish this, Mr. Person. Unless you do you are of no help to me, but I think you ought to distinguish between the pinpointing of companies to whom sales efforts would be directed, that is one subject, and it is in my view a different subject from the following:

The subject of what I'll call the ability of a company to buy cars, whether out of a fleet allotment or not. I would assume that a company which is as vast as General Motors has some organization about ascertaining whom they direct their sales efforts to.

If somebody is in the fleet department of a big dealer or -- now I'm away from General Motors and into the dealership, but it seems to me the dealers would want to have information, so if you are in the fleet section of a big dealer and you decide "I want to spend my time profitably selling fleets of cars," well, I would assume they would not want to just start hoofing it out on the street. They would want to know where to go and we all know about Hertz and Avis, but they are not the only fleet buyers.

Who are the fleet buyers? Who should I

call on to try to sell cars? What is the way to make my time most efficient? And so forth and so on. Who put in phone calls to or who to send the letters to.

It seems to me there is no conceivable argument that it is unlawful for General Motors to give a list to its dealers identifying people who are big users of cars so thatthe dealers can direct their sales efforts to them.

MR. PERSON: I never maintained that that alone is the claim.

THE COURT: Does it follow because of the material on page 802 --

MR. PERSON: What I have done is go through his testimony on an orderly basis. I just want to show with Stewart for example -- let me go through Stewart and pick out various things he says.

THE COURT: Get to the point where he says that there was a necessity for somebody like Nabcor to have a fleet certificate in order to get cars. Maybe he says it and maybe he does not, but that's the thing, at least that's step one, before we get anywhere.

Go ahead. I'm looking for the latter point.

MR. PERSON: If I could show with Stewart as an example. It would only take a few minutes. We would have been done with it probably by now with what I have, but I have a lot of testimony by him which adds up to exactly what I'm saying, and I have not tried to reshuffle it. I'm going through the book. I feel forced into reshuffling at this moment.

THE COURT: That's all right.

MR. PERSON: Your Honor, I'm going to try to do it the way I want to do it.

THE COURT: You go ahead.

MR. PERSON: This reference to 20 or more cars by Mr. Stewart, remember, is the fleet certificate requirement.

THE COURT: Of course it is.

MR. PERSON: Not the fleet rebate requirement.

On March 22, 1966, Mr. Stewart testified, at page 812, that there were not fleet rebates made available by GM to any of its dealers. That is just to show there is no fleet rebate program of GM as of that date. I want to eliminate fleet rebates as an issue.

813: I'm glad I asked him before the

break if he was aware that Nabcor resold cars.. That was the last question I got in right before lunch. That's at 813.

822: If he is selling a fleet account, meaning purchaseing 20 or more cars, he would classify this as a fleet account and mark it fleet.

He can't recall on page 823 --

THE COURT: He's the fellow that testified about the three categories of orders; is that right? Sold, stock and fleet? Isn't he the one that introduced that?

MR. PERSON: I must have asked him about it.

THE COURT: Is that what he's talking about here?

MR. PERSON: That's right.

He can't recall the last time --

THE COURT: Don't we have a chart as to Ruckle sales? What's that?

MR. KAPLAN: B7, I believe.

MR. PERSON: 823: He can't recall the last time whether the factory asked if the fleet account had a fleet certificate. The jury can construe that to mean that there had been a time when the factory had asked for a fleet certificate in order to make fleet allotments.

Page 832: He did try to be consistent in ordering in the fleet department, meaning keeping fleet orders as fleet orders or retail as retail. They tried to be consistent there.

832: With regard to changing the Nabcor orders from fleet to sold, the explanation was that maybe Stewart was not writing the orders.

833: Fleet orders did not drop out of his vocabulary at that point when Nabcor orders became sold orders instead of fleet.

845: This is in cross-examination. At page 845 Mr. Stewart says that fleet selling of automobiles is done at substantial discounts below retail because they're looking for volume.

THE COURT: Certainly.

MR. PERSON: That's understood. No dispute about that.

Then we stipulated with respect to the '67 plan, that it required 20 or more registrations, and all of the subsequent plans were reduced to ten.

855: This Exhibit 626, the national account list, allowed Stewart or Ruckle to determine in advance eligibility for the $50 allowance, and if the company was eligible you had to ask General Motors whether you could get the $50. This is a statement in effect that they have to call the factory if a company --

THE COURT: So?

MR. PERSON: I'll put it all together, your Honor.

Another point, 856, there is no delivery differences --

THE COURT: Why should they have to call the factory every time? What is the problem about a list? It saves long distance calls.

MR. PERSON: If Nabcor is not on the list then they have to call the factory.

THE COURT: Is that wrong?

MR. PERSON: I have not said it's wrong yet.

THE COURT: Proceed.

MR. PERSON: Page 860: They had fleet accounts to whom they sold only one car.

869: Stewart said that they could drop ship if the purchaser was a recognized fleet account, a commercial account, with 20 or more using or leasing.

And Frank Maiorana had said he had a leasing company.

Earl Stewart told Frank Maiorana, page 880, that he needed 20 autos currently in use. He got copies of the registrations --

THE COURT: What is the context of 880?

MR. PERSON: 880 is that they were not a fleet account.

THE COURT: Nobody could understand Stewart's testimony unless you got the trend of what he said. I don't understand it from your narrative.

It seems to me that on one or two crucial points he gave one version on his first day of testimony, and then, at the very end ofthe day, after I had a side bar and I asked him a question, he started in in some way that surprised me and seemed to involve a radically different version, and I discussed it with the lawyers, and that's why we brought him back the next day. He would have been through. The lawyers were all through with him.

Contrary to the disqualification application it seemed to me that my questioning of him brought out, it was not intended to do so, testimony favorable to the plaintiff or the defendant, but the change of his testimony was quite favorable to the plaintiff; and then he came back the next day and you interrogated him, and then I think he gave a certain version, and then he was subject to some recross or something like that and he went back to the version one.

I'm saying this very roughly, but if we are going to analyze Stewart's testimony, you can't do it sensibly without taking into account those changes. What was it that --

MR. PERSON: This is about --

THE COURT: It seems to me his first version was that the fleet certificate was basically irrelevant: You never had to worry about allotment problems; it didn't make any difference whether you said an order was fleet, or sold, or stock. You got plenty of cars and that was that.

There was something he testified to that surprised me.

MR. PERSON: I think I can hit it if I continue.

THE COURT: No. You are way past my point.

MR. KLEINBARD: I think you are looking for 868 and 869, your Honor.

THE COURT: That's right.

(Pause)

THE COURT: I don't know what significance this has now, but I think that the thing was that originally he had only testified, or you had only asked him, about one conversation with Frank Maiorana, and then -- I could be wrong -- but in 868 and 869 he talked about an original conversation where Mr. Maiorana said he wanted to purchase automobiles in quantity, and Stewart said, "I was very interested in selling automobiles."

And then there was some mention of drop shipment, and then the statement which Stewart said he made to Frank Maiorana to the effect that this type of business would be engaged in if he was a recognized fleet account, a commercial account buying 20 or more cars a year "utilizing these automobiles in your own company, a leasing company."

Mr. Maiorana told him he had a leasing company, he had a leasing company in Philadelphia, and that there would be no problem to secure copies of registrations and so forth.

I don't know whether you were emphasizing this, but I regarded this, and I think the record is plain, as a completely different type of statement than what he had theretofore made.

Had he prior to that time ever said that he told Maiorana that in order to buy cars he had to be a recognized fleet account -- he had not said that before, had he?

MR. PERSON: He's saying it again later on.

THE COURT: But had he said it before that?

MR. PERSON: I have every reference here.

THE COURT: I think it was just the opposite purport.

MR. PERSON: If he's selling it to a fleet account he would mark it as fleet. That's leading up to that. That's consistent that you mark it fleet when it's a fleet account.

I have other testimony that --

THE COURT: It is not necessarily consistent.

MR. PERSON: Fleet account means fleet allotment.

THE COURT: It does not mean fleet certificate though. That's the crucial thing.

MR. PERSON: That's coming too.

THE COURT: He had never said prior to this time anything about a requirement for a fleet certificate?

MR. PERSON: He said he can't recall the

last time, and then stopped, and then he said whether the factory asked if the fleet account had a fleet certificate. That suggests it did occur at one time or he doesn't recall at all. It suggested that the factory does this or did it.

THE COURT: Mr. Kaplan, do you remember the trend of Mr. Stewart's --

MR. KAPLAN: I have the trend of the testimony. Your Honor is quite right. What happened was that Stewart had never said anything about fleet certificates being necessary and at the end of the day, 868 and 869, he came out with this statement that your Honor was so surprised with and I think everybody else was so surprised with. In fact, he added a paragraph to it.

THE COURT: I have some notes. On 828 -- and this, of course, is before that development at 869 -- at 828 Mr. Stewart was asked:

"Q Do you know what a fleet certificate does for a holder of it?

"A Not really."

And then on 829:

"Q Do any of these fleet orders include the identification, that is, the fleet certificate number of the person for whom you are ordering the car?

"A You mean with the fleet certificate number on the factory order?

"Q That's right.

"A Not to my knowledge. I don't recall ever having read a fleet certificate number on a factory order in ten or more years."

830:

"Q As to those fleet orders, do you recall any of those fleet orders for Nabcor?

"A No.

"Q Do you know why these were submitted as fleet orders to the factory?

"A A little earlier in my testimony I said I didn't think it made much difference on a factory order whether you have sold fleet," etc., and on and on.

MR. KAPLAN: Your Honor --

THE COURT: The real question is which version, if any version, of Stewart are you going to accept?

MR. KAPLAN: Your Honor, there is no inconsistency because the next day he really did straighten this point out completely.

pgr23

Among other things, the next morning on redirect by Mr. Person he was asked at 920 whether General Motors had any requirement that the customer have a fleet certificate, and he said no, he needed cooperation from the company; and then he went on to say that sometimes he felt better if he had a fleet certificate because he thought he would get better cooperation from the company, and then he wound up on recross saying that there had been two occasions --

THE COURT: What page?

MR. KAPLAN: I think it's 960 and following. There is a whole string where he straightened this out.

THE COURT: Just to get this thing back in order, all I'm saying to you, Mr. Person, make any argument you want on the basis of Stewart's testimony provided you take into account what I'm quite sure were different versions at different times.

You can be of maximum help to me by illuminating -- I think I'll come back to you, Mr. Kaplan -- the meaning of his testimony provided you take into account his different versions.

MR. PERSON: I will try, but I would rather have Mr. Kaplan take up that portion since he has a greater interest in finding it. I have a conflict of interest here. I am trying to present what I think he's saying in terms that support my case. There may be a little bit of evidence that goes the other way as well.

THE COURT: We are finished with the first volume, the November 29 volume. What do you say the purport of that testimony is?

MR. PERSON: May I go through the rest of it? It is not that much longer. It's useful in having --

THE COURT: I'm not clear as to what you have told me so far about the fleet certificate thing.

MR. PERSON: What I'm saying so far, I'm trying to put together what his understanding is of the fleet certificate. I'm trying to show --

THE COURT: That's right. That's very important. What do you say he testified to about his understanding of the fleet certificate?

MR. PERSON: Some of this is dependent upon other evidence. For example, the meaning of fleet. I have other evidence which shows that that means fleet allotment. When you check fleet it means fleet allotment.

THE COURT: Stick to Mr. Stewart's testimony.

MR. PERSON: When he's talking about checking the fleet, that means he is looking for a fleet allotment based upon other evidence I will relate to you. When he sells to a fleet account, he classifies it as a fleet account, and that's the definition that I related earlier. Based on the manufacturer's definition when he checks fleet that means he's ordering the cars through a fleet allotment.

It could be construed that there was a time at which the factory did ask for a fleet certificate. It's clear that he can't recall in more than ten years thefact that he ever asked for a fleet number of a certificate as distinguished from evidence of the certificate itself.

He would try to be consistent in ordering in the fleet department, so whan he checked fleet it meant that he was taking down the fleet allotment. When he checked stock, I infer he meant by that --

THE COURT: Where does he testify that he was taking down a fleet allotment?

MR. PERSON: I explained the basis up to this point in which his statement -- I have evidence that shows that checking fleet means you are taking down fleet allotment.

THE COURT: Mr. Person, you are talking about Mr. Stewart's testimony. I would like to know if he ever testified that by checking the fleet he was taking down a fleet allotment, whatever that means. Did he so testify?

MR. PERSON: I would have to go through my notes.

THE COURT: Do you now know? You have notes about his testimony.

MR. PERSON: I'm trying to go through this.

THE COURT: I'm going to assume, unless you tell me very shortly, that he never testified to such a thing.

MR. PERSON: 905 -- but now you are breaking up what I tried to do. I wanted to lead into that and it's significant in that respect -- 905, the context of it is very significant.

THE COURT: This is on your redirect the second day. All right. What do you say 905 shows?

MR. PERSON: That going back to 903, if I can just jump back two pages, that this information about Nabcor's registrations which were obtained as a result of wanting to apply for a fleet certificate, these went to the fleet representative of Pontiac, which was Walter Gray, and 903 --

THE COURT: What went to Walter Gray?

MR. PERSON: The registrations that Frank Maiorana had come up with.

THE COURT: That's in connection with that attempt to get a fleet certificate?

MR. PERSON: We are leading into that.

THE COURT: I tell you, Mr. Person, I do not like to interfere with your argument but it seems to me that the only way you cna help me or yourself or the Court of Appeals in any legitimate way is to be very precise on what the evidence says.

I assume at the moment that it is of some importance to you to show that there was a relationship between the fleet certificate and the fleet allotment, right? Tha's what you are talking about?

MR. PERSON: Yes.

THE COURT: I think if you are going to say that Mr. Stewart testified about the relationship between fleet certificate and fleet allotment, you better be careful that he so testified and give us chapter and verse.

I don't know whether he did or not. I don't recall at all. Do not mix it up. It is a source of confusion, and you are not entitled to confuse people in this case. If you sort of mix up your inferences or your inferences from other evidence in discussions of Stewart's testimony, we are going to get confused.

(Continued on next page)

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MR. PERSON: We are in the context now that Mr. Stewart had applied for a fleet certificate through Walter Gray on behalf of Nabcor. That is page 902 through 904, and actually Mr. Stewart stated at page 904, he stated to Gray in a conversation that Nabcor was going to be in the leasing business.

Page 905, the important point is that Mr. Stewart testified that he had told Gray that Stewart was trying to secure a fleet certificate for Nabcor, and if Stewart were to secure a fleet certificate number he would be able to handle a large number of car sales.

THE COURT: Let me see that testimony.

MR. PERSON: That is a very important part.

THE COURT: That is what he said.

MR. PERSON: Then Gray said, page 905, that he would have to prove that Nabcor was in the fleet business, owning or operating 20 or more cars per year. And to qualify Gray said, "You need documented proof of copies of registrations."

I am arguing that that interchange is an admission by General Motors that a fleet certificate would allow a purchaser to be able to get extra cars out of the fleet allotment.

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THE COURT: Let me just pause a minute. What was the last point?

MR. PERSON: May I ask the reporter to read that back?

(Record read.)

THE COURT: The most you can say, you are really hanging on this statement which you read from 905, Stewart telling and Stewart, of course, is not an employee of General Motors. I don't know that this is an admission of General Motors, but Stewart said that if he were able to secure a fleet certificate number, then he would be able to handle a large number of car sales from Nabcor. He doesn't say anything about allotment, but I get your argument, in any event.

MR. PERSON: He is also discussing a transaction that he had with an authorized representative of General Motors who is responsible for the statement I have read. I summarized, and there was no denial that the issuance of a fleet certificate would not have the effect that Stewart claimed it had.

THE COURT: Let's go forward, then.

MR. PERSON: Page 920, Mr. Stewart said that Nabcor wants to drop ship. Stewart said also that he could not get involved in that unless he had 100

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per cent cooperation from the corporation. I take it that is a reference to --

THE COURT: Who is Stewart talking to now?

MR. PERSON: Just testifying about his -- this was after Frank Maiorana was to prove to Stewart that Nabcor was a fleet account. That is what Stewart stated, page 919, line 10.

At page 920, line 4, approximately --

THE COURT: What is the significance of the testimony at 920?

MR. PERSON: That the fleet certificate would enable Stewart to be able to drop ship for Nabcor and without that he would have problems, relating to the corporation, GM.

THE COURT: This is something Stewart tells to Mr. Frank Maiorana, right? Is that binding on General Motors? Is it General Motors policy they would only drop ship if the customer of the dealer was a fleet account or had a fleet certificate?

Is there any such policy on the part of General Motors?

MR. PERSON: If this is a dealer's understanding of what the fleet certificate does, I am offering that in evidence of our own problems and the

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need to have a fleet certificate.

THE COURT: Is that a violation of the antitrust laws for Mr. Stewart to misunderstand General Motors' policy?

MR. PERSON: I don't think it is a misunderstanding. I think he is telling what the effect is. He is testifying to the effect.

THE COURT: Is it correct? Did General Motors have a policy they would only perform drop shipments for holders of fleet certificates?

MR. PERSON: I think that might be for them to come in and explain that Mr. Stewart is wrong.

THE COURT: Did they have such a policy? Do you claim they had such a policy?

MR. PERSON: I am claiming that Earl Stewart found it necessary to have a fleet certificate.

THE COURT: That isn't the answer to my question. I want an answer, do you claim that General Motors had any such policy? I have never heard about such a policy.

MR. PERSON: I think the claim is that a practice existed by which if you did not have a fleet certificate, that you had difficulties in arranging drop shipments.

THE COURT: That is not the same as what I asked you.

MR. PERSON: I am sure General Motors had no policy --

THE COURT: You are sure they had no policy, that is the answer.

MR. PERSON: I think they should have a policy. But I would say that what has happened, the inference being that with drop shipments for people that don't have fleet certificates --

THE COURT: We have one case of an inference with drop shipments, one case complained about here. I don't see any reason to spend time on drop shipments at all.

MR. PERSON: I am trying to point out that this fleet certificate has meaning, and this was an example.

THE COURT: All right, you go forward.

MR. PERSON: Mr. Stewart went on to say at page 920 that if you were Hertz or Avis, the same guidelines as a national fleet certificateholder, so that Ruckel could enter into an agreement and supply them with automobiles throughout the United States.

This is further evidence that a fleet

certificate is the key for being able to make substantial sales of cars to persons.

THE COURT: Mr. Person, my frustration is as follows: the talk about substantial sales there, there just was never any need for that.

MR. PERSON: That was the result of a conspiracy.

THE COURT: That is what your argument is, but I just don't really -- we have a log which as of a certain point every single order received by Nabcor is entered, hopefully that is it. If it isn't, it is certainly a substantial amount, and those orders, to talk about substantial numbers of cars -- I mean if the plaintiff here were Hertz or Avis or somebody who really needed big amounts of cars, and New York Telephone or somebody, there would be something to talk about.

MR. PERSON: What number are you saying now you think would be a substantial number to a dealer? If a dealer can sell his whole retail allotment --

THE COURT: I want to ask you now before further ado, tell me of any instances where Nabcor had trouble getting cars or where a dealer had trouble getting enough cars to sell to Nabcor because of the inability to get cars on a fleet allotment? Let's come to that fast. You tell me the instances.

MR. PERSON: Up in Buffalo, those instances in Buffalo attributable -- I believe we can very well infer from the evidence and as far as the dealers are concerned, we have evidence with respect to that.

THE COURT: That is an answer to my question, instances in Buffalo. Are there any other instances?

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MR. PERSON: The problem with Colonial Cadillac. In that case, the inability to obtain a fleet allotment, leasing allotment, as it is called, for Nabcor thrust Colonial Cadillac back into the situation where they would have to supply cars out of their retail allotment and they testified that insofar as the retail allotment is concerned, that they make this available to the higher paying retail customers.

THE COURT: You tell me about the evidence that Colonial Cadillac was prevented from selling cars to Nabcor because of the inability to get that allotment in respect to Nabcor. Where is the evidence?

MR. PERSON: That isn't even in dispute, your Honor, other than what orders were there.

THE COURT: Who does not dispute it?

MR. PERSON: The stipulation was, there was a policy against allowing retailers to have any fleet or any leasing allotment whatever.

THE COURT: The Cadillac Division had a specific allotment for rental and leasing. This was testified to by Mr. Murray, I guess, and there was no question about it. It is not disputed by General Motors. That there was an allotment, and my question is, where is the evidence that Murray ever lacked any cars from any allotment to sell to Nabcor if he had wanted to do so?

Where is the evidence that there was any allotment problem that prevented Murray from selling cars to Nabcor?

MR. PERSON: If you accept the proposition that no orders on a leasing allotment basis were submitted by Colonial and would have been filled by GM, since we have stipulated that would be contrary --

THE COURT: What proposition?

MR. PERSON: That any orders submitted by Murray for Nabcor to take down any part of the leasing allotment would not have been filled by GM because it would have been contrary to GM policy. Isn't that what the stipulation means?

THE COURT: I think it is a fact in this case that Colonial, if the facts are truly represented --

MR. PERSON: Let me assume that everything I say --

THE COURT: Let me finish. I think that it is true that Colonial, if the facts are truly represented --

MR. PERSON: That is an issue.

THE COURT: By Nabcor and Colonial to General Motors, the fact is that General Motors would not have made an allotment of Cadillacs to Colonial under what is called the leasing and rental allotment. That was the only allotment of that kind that was ever even mentioned.

MR. PERSON: We are not making a claim, I hope you recognize this, that we had misrepresented the status, and had requested an allotment based on that.

We have been claiming that we had requested Cadillacs from Colonial, he accepted the order, and the amount of 43 or 44.

THE COURT: We are getting off the track.

MR. PERSON: That Cadillac policy prevented him from getting extra cars, that is the claim. I think it is beyond dispute.

THE COURT: I just want to follow this one more moment, and then we have to recess.

I will assume that General Motors would not have given any allotment to Colonial for sales to Nabcor, the allotment we are talking about being the rental and leasing allotment. But that in my mind is just a fact in thin air unless there is evidence that that situation caused Nabcor not to get cars.

I don't know of any evidence about such causation.

MR. PERSON: I have the evidence, though, your Honor.

THE COURT: What is the evidence?

MR. PERSON: That we have entries in the log, Nabcor records, that show that they have orders on Colonial. We have testimony from Frank Maiorana that he entered some of the orders by telephone and even had the orders confirmed orally during December, late December, around Christmas, by Mr. Murray himself, who tried to make up the fact that the cars had not come up, and there is no testimony he said he couldn't get them because GM had refused.

There was an assumption that the orders were still there, that is the import of that testimony.

Then he offered two cars in order to tide

Nabcor over, and subsequently in December or January said he couldn't get the cars.

That to me is evidence that the orders had been submitted or that he had tried to get the cars from Cadillac, but we know from the facts that Cadillac wouldn't give him the cars. That is according to the stipulation, we know that.

THE COURT: We know that that particular allotment was not available, but that doesn't mean that we know that Cadillac wouldn't sell those cars to Colonial.

MR. PERSON: It means they wouldn't sell any cars out of any allotment beyond the retail allotment which Murray had.

THE COURT: We do not know anything about the total number of cars -- maybe we do know, I think there were some figures.

Let's pursue this after lunch a little more, but I would like to get past this fleet certificate question, because I think the best way to get past it is to zero in on the instances as we are now doing, where you claim that it caused some deprivation to Nabcor. You mentioned Colonial and those instances in late 1966 in Buffalo. At least we got to the

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specific instances.

Now, after lunch I want you to talk about anyother instances, let's get all your instances out and wrap up this fleet certificate thing.

2.15.

(Luncheon recess to 2.15 P.M.)

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AFTERNOON SESSION
2:20 p.m.

MR. PERSON: Your Honor, I'm going to continue with this evidence that I have. Maybe if you don't stop me along the way I can put it on the record and if you want to study it you will have it there to look at. I think we can make better time and be able to get into other matters that you want to go into.

Your Honor, I would not object truly if you were not on the bench right now. If you have other things to do, I would rather put it on and you can read it. I'm serious about it. I would like to get it on the record.

THE COURT: I don't handle a trial or argument that way. That is entirely improper to even speak of that. I am the one who has to decide this case. I have a right to do what I feel is necessary to keep lawyers talking about things that bear on the issues that I have to decide.

I, like any district judge, or any judge of any court, can make mistakes but I still have to do this job until somebody slaps my hand and says otherwise, and they have done it before and they will do it again.

MR. PERSON: I'm sorry to have made that statement. I'm anxious to get this on the record.

THE COURT: It's not just a matter of your making a record. I have to come to a decision, and we will work together to that end.

MR. PERSON: Page 930 of Stewart's testimony: He stated in fleet accounts the manufacturer offers a great deal of assistance in the administration of your business. The cars have to be ordered from GM and you have to put delivery instructions on the cars. There are methods of allocation, fleet and retail, and his orders -- I think he was referring to the fleet account -- were going to be drawn from the order bank, and that I feel is a reference to the fleet allotment. He didn't say it but that's what he meant.

THE COURT: Where are you reading?

MR. PERSON: 920, line 23, approximately.

At 921, line 17, approximately, if Stewart came in with an account that was not a fleet account he would have to draw from his own retail allocation, and he went on to state that if he didn't have the retail allocation he would have to go to fleet allocation; and that if he could not get a fleet allocation and didn't have a retail allocation, then he

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would have to turn the order down.

At page 922, line 2 --

THE COURT: Let's pause there: There is something about an order bank and I want to get that.

MR. PERSON: 920, line 23.

THE COURT: I see it. It's 921. That phrase "order bank," I want to look at that.

(Pause)

THE COURT: Proceed.

MR. PERSON: 922, line 2: In order for you to get cars from the fleet allocation the purchaser had to have a fleet certificate.

THE COURT: That's the important evidence on that redirect.

MR. PERSON: 922, line 5: When you turned in a fleet order you identified the customer or the fleet certificate number.

THE COURT: Or something like that.

MR. PERSON: I'm sorry. I better write that down. There is no attempt to shade anything.

THE COURT: It's funny, through, because the yes answer is not as illuminating as it might be.

MR. PERSON: I'm not reading the record. I'm trying to be fair in my summary.

THE COURT: I'm not saying you have not been. I'm just amused at that little situation.

"Q Does that mean that when you turned in an order to General Motors labeled fleet that you identified the customer or the fleet certificate number or something like that?

"A Yes."

If he was saying that he identified the fleet certificate number, if that's what the answer meant, that would be, I think, directly contrary to his original testimony, but I have to say to you, although I think I've heard the answer that way, in reading it it doesn't say it. It's a confusing question.

You are interpreting it as saying that the fleet certificate number is included in the order, right?

MR. PERSON: Or that it's a fleet customer that's identified. It couldbe either way. I meant by this --

THE COURT: I don't think it's all that clear. Maybe other things make it clear.

Proceed.

MR. PERSON: 922, line 14: This was with respect to an exclusive source of supply. This

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is something that Mr. Stewart was hoping Nabcor could turn out to be. He said that Nabcor would have been included as an exclusive source of supply if Stewart had been able to get him a fleet certificate. There would have been no occasion for Nabcor to deal with multiple dealers at that time, if he had a fleet certificate.

923, line 7: This whole thing goes back, according to Stewart, to allocation and factory order. There are different blocks that are marked on the order form.

THE COURT: The trouble is you have made notes perfectly conscientiously, but I have the record and you have your notes and I think there are some mistakes. That page 23, line 7 --

MR. PERSON: The 7 is an approximation.

THE COURT: What is the point there?

MR. PERSON: He was talking about the prior problems that go back to this allocation and the factory order, and that's referring, I believe, to the exclusive -- his testimony relating to allocations and fleet.

THE COURT: Let's have it understood. You are reading from notes. You have done the best you

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can in the time pressure and all, and making notes or points from his testimony. I think anybody reading this record should understand you are reading from your notes. You don't have the testimony in your hand. I don't get what you are referring to on that page.

MR. PERSON: What line does he say the whole things goes back to the allocation and factory order?

THE COURT: I'll try to find it.

MR. PERSON: Line 7, approximately?

THE COURT: You can look at it. I don't see it.

MR. PERSON: It's not really that important but 923, line 7 is the approximate place.

MR. KLEINBARD: I think it's on page 924.

MR. PERSON: That's my mistake. You are right. Thank you.

THE COURT: I see it.

MR. PERSON: He talked about different blocks marked fleet or retail. Once the retail was used up he could not obtain any more cars from retail.

923, line 20: Now the only thing I could do was to sell only to those recognized fleet accounts where the allocation had been made up.

925, line 8: He probably told Frank Maiorana that he could not get orders for him on the fleet orders because of no fleet certificate.

THE COURT: Just a minute.

(Pause)

THE COURT: The question was 925:

"Q Did you tell him you could not longer get orders for him on the fleet orders?

"A I think that would have been a natural part of the conversation."

MR. PERSON: 926, line 6: Ruckle orders did indicate Nabcor's name on it, orders to the factory indicated Nabcor's name.

THE COURT: That's where?

MR. PERSON: 926, line 6, approximately.

THE COURT: Wasn't one point made in Stewart's testimony that after the fleet certificate was turned down he no longer marked the orders fleet? I thknk he had failed to mark some previous orders fleet but at least after the fleet certificate was turned down all subsequent orders were not marked fleet.

MR. PERSON: He had no recollection as to whether Gray had told him whether to change from fleet --

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THE COURT: I'm not talking about that.

MR. PERSON: That would be the turndown.

MR. KAPLAN: The testimony I think you are referring to was the testimony that after the fleet rebate application made by Rohrer was turned down she changed the method, Miss Madden.

MR. PERSON: 950, line 23. The record states that October is the date on whichthe orders were changed from fleet to sold. I believe we derived that from a chart or something.

That, incidentally, I got to get into the record. I might as well put here is the same time that Mr. Holzworth told Mr. Maiorana he should get a fleet certificate. I have yet to find the reference.

Then we go into 960, line 1. That's right after the perjury thing was brought up. I have that underscored as the perjury bit.

He stated there that with respect to the fleet allocation it was necessary to have a fleet certificate.

THE COURT: 960 is the commencement of Mr. Kaplan's recross. What do you say?

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MR. PERSON: I say that it confirms, my notes state regarding the fleet allocation necessary to have the fleet certificate, this is confirmatory language in that --

THE COURT: Sure. The first question by Mr. Kaplan:

"Q Mr. Stewart, on direct this morning in response to a question from his Honor you said that in order to get cars from the fleet allocation it was necessary for the purchaser to have a fleet certificate. Do you recall that?

"A If I said it, I said it.

"Q Is that the case or was it the case in 1966 or 1967?

"A Not really."

I mean, you read that along with his testimony of 922, and I guess that is what Mr. Kaplan was recrossing him about. But, anyway, that is the start of 960.

MR. PERSON: I think he did say "not really." I thought maybe there is something several lines later.

THE COURT: I haven't read past this, and then I told the jury to go out of the courtroom and read about the perjury.

MR. PERSON: 964, line 16, he then states that you have to have a fleet number when requesting a specific number. He is talking about the necessity of fifteen or sixteen hundred automobiles, stating that you have to have the fleet number when requesting a specific number of automobiles. For example, that many, this is set up months in advance, that is when the fleet certificate orders, fleet owners, does have a bearing on the capacity of the delivery.

THE COURT: Let me read that.

Is this what you were reading earlier, Mr. Kaplan?

MR. KAPLAN: That is what I was referring to, part of it.

THE COURT: What do you make out of this testimony? This would, I guess -- what he is trying to say here is explain the apparent contradiction because you said at one time it is necessary and at another point it is not necessary, that is a fleet certificate is or is not necessary to get a fleet allotment.

He is trying to say when you really have very, very large numbers of automobiles you have to set it up months in advance and the fleet certificate has a bearing.

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MR. PERSON: That may be in relation to the size of this dealership, too. There is a fleet certificate requirement of some kind to get cars to the fleet allotment. I think it is clear from his testimony there is some use of the certificate for that purpose and therefore --

THE COURT: Look, if you are talking about this as a fact, this is something that is a matter of General Motors requirements, right?

MR. PERSON: Not written anywhere at all.

THE COURT: But when you are talking about requirements, you are talking about requirements of General Motors, not requirements of dealers?

MR. PERSON: The reference is to General Motors' policy.

THE COURT: To General Motors' policy.

MR. PERSON: Or how they conduct their business.

THE COURT: Now, it seems to me Mr. Stewart is a terribly poor witness to prove General Motors' policy. Not that he isn't in a position to know -- perhaps he is in a position to know -- but there are people in a lot better position to know and that is people inside General Motors.

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MR. PERSON: I have testimony there, too, your Honor.

THE COURT: That a fleet certificate is necessary in order to get cars from a fleet allocation or whatever it is you are talking about?

MR. PERSON: It adds up to that.

THE COURT: Is there testimony? Did you ask any specific questions? Did you ever ask a General Motors witness this question pointblank; did you?

MR. PERSON: I am sure I did, yes.

THE COURT: Is it in evidence in this case?

MR. PERSON: Anything that supports this I have tried to put into evidence.

THE COURT: Does any direct evidence support this?

MR. PERSON: My conclusion is yes, in terms of the purpose of the fleet allotment.

THE COURT: But I want to know about evidence, testimony. Did you ever ask the question of anybody that you asked Mr. Stewart at page 922? It is a perfectly normal question. Did you ever ask anybody at General Motors that question?

MR. PERSON: I have asked them that question, yes.

THE COURT: What is their answer?

MR. KAPLAN: 3041 and 3042 of the transcript, your Honor, among other places.

THE COURT: What is the testimony?

MR. KAPLAN: 3041 and 42, Mr. Rock.

(Testimony read.)

MR. KAPLAN: That is only one of the many places.

MR. PERSON: That isn't what I derive from the information I get. First of all, Rock said that it is a divisional authority to set up fleet allocations, and that is 3028, line 8.

THE COURT: Going back to Mr. Stewart's testimony, let us suppose just as an isolated question, could the jury find if this was some essential question to the case, could the jury find that a fleet certificate to get cars from a fleet allotment? That is your question, isn't it? Is that the right way to phrase it?

MR. PERSON: That is correct. With Stewart I only have three more --

THE COURT: I just want to consider this. I don't know whether this is going to make or break the case, but I have a real question here.

Stewart's testimony goes back and forth.

He is not General Motors and whether his testimony would constitute a basis for a jury to so find as against the flat contradiction by General Motors witnesses who really are in a far better position to know, that is a question to me.

MR. PERSON: With Rock,I have some facts from him that undermine what he stated.

THE COURT: All right, let's finish up with Stewart.

MR. PERSON: With Mr. Stewart, 975, line 21, Stewart never asked persons whether they had a fleet certificate because he had the published list and that is reference to our Exhibit 626, I believe.

977, line 7, the accounts Stewart had were on fleet allotment,and 978, line 21, published lists of people who had a fleet certificate. That is 626, the list of fleet owners.

THE COURT: Is there any testimony -- maybe you already mentioned that -- about why he put fleet down sometimes and sold down other times? Maybe he didn't do it.

MR. PERSON: What happened there is a cutoff date where the orders after October become sold and October is the critical date for several reasons that I

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already explained.

Even MacNamara is another reason, one of interpretation when the MacNamara conversation took place, when Holzworth and MacNamara and Gray, all of them contacted at or around October of 1967.

THE COURT: Gray?

MR. PERSON: Walter Gray -- actually, I am sorry, that was 1966.

THE COURT: We are talking about October, 1966.

MR. PERSON: I mean 1966, with Holzworth at the meeting and Gray with the other thing.

MacNamara, Hozworth and Gray all communicating with Ruckel about the time Ruckel switched from fleet to sold.

2 THE COURT: Your inferences boggle me. What possible effect could MacNamara's contact have in making him change from fleet to sold? If that is a conspiracy to get them to change from fleet to sold, it isn't much of a conspiracy.

MR. PERSON: That isn't our emphasis on MacNamara. We believe that took place at the time of the refusal to deal.

THE COURT: I see no connection, no rational connection between MacNamara's visit and changing from fleet to sold.

MR. PERSON: If changed order to fleet means that is what activates the fleet allotment, then the changing of that method of ordering at that time requires the dealer to take the cars out of the dealer's own retail inventory, and that is limited.

THE COURT: I thought you were arguing that MacNamara's visit was some kind of an indication to shut Nabcor off.

MR. PERSON: That is correct.

THE COURT: Now it seems to me that this isn't a situation of just pleading lesser included offenses. If MacNamara went there and indicated or implied or innuendoed or threatened or said something to get them to cut Nabcor off, it seems to me that is inconsistent with any idea that MacNamara went and somehow it resulted in a change from fleet to sold.

MR. PERSON: What I am saying is that -- our position is MacNamara went there at the termination, February.

THE COURT: You don't even contend MacNamara was back there in October?

MR. PERSON: Our contention is February of

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that following year.

THE COURT: I just can't deal with all of this in that way. You mentioned Gray. Did Gray go and see --

MR. PERSON: He was involved in an attempt to get a fleet certificate, and it was a denial. There was a denial of the fleet certificate for Nabcor during that period.

THE COURT: During what period?

MR. PERSON: After several months, after March, 1966, when the first contact was made, and Mr. Maiorana, I believe, put it into September, October. But Mr. Kaplan can be more specific as to the exact time.

THE COURT: I can be more specific right now. Mr. Maiorana testified at the very first that he met Walter Gray in late November or early December, 1966, and he had been to this meeting, buying cars from Ruckel, been to the meeting and met Holzworth --

MR. PERSON: It is an October meeting, I believe.

THE COURT: Fall of 1966.

MR. PERSON: That puts it at the same as the change.

THE COURT: What does that have to do with

Mr. Stewart or anybody else at Ruckel changing from fleet to sold?

MR. PERSON: What we are maintaining is that the method of ordering cars on a fleet basis is what permits the dealer to get extra cars to fill orders.

THE COURT: I know that, but just tell me how logically meeting Holzworth --

MR. PERSON: Or having a denial of the fleet certificate at this point.

THE COURT: He didn't have a denial of the fleet certificate at this point.

MR. PERSON: Walter Gray turned down the fleet certificate request from Nabcor.

THE COURT: When?

MR. PERSON: In this time period.

THE COURT: In this time period could mean a span of six months or three centuries. I don't know what you are talking about.

MR. PERSON: Right after this meeting in October of Nadfa.

THE COURT: Frank Maiorana testified he met Gray in late November or early December, at least that is one page of my notes. I am looking at it right now.

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Let me look at another place.

There was a subsequent meeting a couple of weeks later after the first meeting. Gray wanted to know about registrations; there was no subsequent communication and didn't receive a fleet certificate.

Is there any documentation of that?

MR. PERSON: No, none, after Stewart testified that the fleet certificate application was turned down by Gray.

THE COURT: Did Stewart testify after that they switched from fleet to sold? It would have been a natural question to ask him. Did you ask him that?

MR. PERSON: He said that he does not recall whether Gray had told him to change from fleet to sold.

THE COURT: So there isn't any evidence as to why they changed from fleet to sold, is there?

MR. PERSON: By inference there is.

THE COURT: But if the denial of the fleet certificate came in December --

MR. PERSON: I think there is not more than six weeks.

THE COURT: Six weeks, but there were orders, they started to change those orders from fleet to sold October 13.

MR. PERSON: It is around the time of the meeting, the Nadfa meeting.

THE COURT: I have to tell you, Mr. Person, there are logically inferences that aren't logical at all. I cannot understand this as being any explanation.

MR. PERSON: Hilda Madden, 1034.

THE COURT: What is that?

MR. PERSON: Asked if anyone told her it took 20 vehicles to be eligible for a fleet certificate and she said no, but it is in the rebate booklet which she brought with her. That is Exhibit 626. That is her understanding of the meaning of that book.

Then 1036, line 15, said Nabcor orders were submitted fleet, and then sold, and this occurred after the fleet rebate was denied, that application submitted in November of 1967. Switched to sold as the designation after the fleet rebate application.

THE COURT: From where?

MR. PERSON: From Rohrer Chevrolet.

1053, line 11, the name of the fleet customer was always submitted to GM.

With Robert Dillon, 716, line 24, his company had a fleet certificate.

Page 718, line 10, GM informed him that once

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they get the orders they can do anything they want with it. There is a distinction between getting an automobile and being able to order it.

(Pause.)

pgr1

THE COURT: Proceed.

MR. PERSON: 742, line 24: The word "fleet" on the GM order form is anything that Ruckle considers fleet.

743, line 16: The fleet certificate has nothing to do with ordering the car, according to Dillon. If he checks fleet on the form it goes through as fleet.

That means to me that the word "fleet" on the form is an indication that the fleet allotment is to be used.

The Court asked: What does fleet mean on the order? 746, line 13. And he referred, the witness Dillon referred to fleet allocation and retail allocation.

That was his answer to your question, your Honor, as to what the word "fleet" means.

746, line 20, fleet on an order avoids having it come out of the retail allotment.

THE COURT: I cannot have this. There is a motion to dismiss and it does not require the statement of what you would choose to put in a brief to the Court of Appeals. You will have an opportunity to write a brief if you lose this motion.

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In my mind this evidence does not contribute to the problems that I'm dealing with. To me, it is a diversion, it's a sideshow, or whatever you want to call it.

MR. PERSON: It's part of the complaint.

THE COURT: I know you went into all these things. I know you could go on and on citing references in the record about these matters, but I'm going to cut you short because I want to come now to the question that I mentioned before lunch and that is, I want to know specifically what dealers or what transactions were prevented because of this, because I heard little or nothing about any situation where an allotment problem prevented Nabcor from getting cars.

My amendment to that is that there has been some reference by the defense to the beginning of the model year and the end of the model year. There has been some reference to short supplies in Corvettes and limited production models, namely Cadillacs. I think those situations are referred to by them as possible explanations for either delays in some instances or problems about getting cars.

But in my mind that is a different matter from specific evidence about a fleet allocation problem.

This is what you are talking about. You are talking about something you call an illegal practice. You assert that you had to have a fleet certificate to permit a dealer to get cars for you under a fleet allotment. That's a specific allegation, and I want to know a specific causal relationship. If you want to relate it to one of these cars where it was a new model, or the last of the model year, fine, let's do that. Let's not go on and on.

I cannot just have this going through of all this evidence. It's not appropriate on a motion unless it is relevant and it is not.

MR. PERSON: We disagree heartily. I will not burden the record any further in light of what you are saying except I want to add one further thing for Dillon, because I got to this point, and that maybe a good point to terminate with him.

He said that Ruckle Auto Rentals did have a fleet certificate and, yes, he used the fleet certificate to buy cars. This was Mr. Dillon at 768, line 6 and 768, line 16.

What you are raising now is what happened? What are the consequences? That's what you are looking for.

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THE COURT: Exactly.

MR. PERSON: I have a series of consequences that are listed here, and I would like to list them first, and maybe we can pursue them in light of that.

I claim that Buffalo was caused by both the black list and the white list theories, namely every time Bolling or Strimple went up to a dealer and made a request for a volume commitment the white list problem is what initially had caused and could be used for purposes of drawing the inference that the dealer communicated with the factory concerning the volume request and, subsequently, when the dealers tried to do business after having agreed to do so, it related at least to the white list if not to a black list argument which is there because of the BADA bulletin and Mr. English and the activities of the dealers generally.

I think you have both a white list and black list problem operating up there quite clearly.

THE COURT: I thought you were going to list several.

MR. PERSON: I wanted to explain that.

Then with Rohrer Chevrolet, Rohrer Chevrolet involved delays in the delivery of automobiles as to which Mr. Anthony Maiorana has attested and we have

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evidence of delays.

There were some cars that were delivered during the same period. There were other cars that were not. But the deliveries resumed in February of '68. Certain cars were held up and this occurred --

THE COURT: I think we have to go into this more specifically.

MR. PERSON: Rohrer Chevrolet was --

THE COURT: What else besides Rohrer? Make your list of your points.

MR. PERSON: Cadillac, all of Cadillac, is covered by that leasing problem together with a hiding of title as evidence of the black list and the leasing allotment is the white list. So with Cadillacs there is a white and black list working as a result of that.

Also with the Corvettes for which there were no leasing allotments. There were no fleet allotments for Corvettes and the hiding of title is then a black list problem. There were no fleet allotments for Corvettes so we aer not maintaining there was any fleet allotment.

THE COURT: In other words, there was no fleet allotment for Corvettes, period.

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MR. PERSON: Will you stipulate to that?

MR. KAPLAN: That's what the record tells.

MR. PERSON: It's a black list problem. Moe Cerota for one. We have Mark Stolarski as another one. This is hiding of title.

THE COURT: Will you concede there was no fleet allocation for Corvettes?

MR. PERSON: That's right. Corvette came out of the retail allotment. I don't think there is any disagreement.

THE COURT: All right, that's right.

As far as the consequences of the fleet certificate problem, you have listed the Buffalo situation, a Rohrer Chevrolet situation, a Rohrer Chevrolet situation, and the Cadillac situation.

Are there any other points where you claim there were consequences of the fleet certificate problem?

MR. PERSON: Ruckle Pontiac.

THE COURT: What else?

MR. PERSON: The turn-downs that occurred in the '66-67 period. Those turn-downs we attribute to a black list and a witness list theory.

THE COURT: What turn-downs were those?

MR. PERSON: The turn-downs that occurred

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all in the same time frame which included Colonial --

THE COURT: List the ones you are talking about so we have a complete list.

MR. PERSON: Colonial we have covered already.

THE COURT: Give me the list.

MR. PERSON: Midtown, Luby, Bates Pontiac, Ruckle.

THE COURT: What else?

MR. PERSON: Rosenstock Olds, Paragon Olds.

THE COURT: Colonial, Midtown, Luby, Bates, Ruckle, and you say Rosenstock Olds?

MR. PERSON: Paragon Olds.

THE COURT: What else?

MR. PERSON: Sharkey Buick, Cunningham.

THE COURT: Don't pick names. What is the evidence? I don't think there is a lick of evidence about Sharkey or Cunningham. Tell me if I am wrong. Find it.

MR. PERSON: Sharkey Buick turned down when it became Cunningham.

THE COURT: When?

MR. PERSON: April of '67.

THE COURT: Where is it listed?

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MR. SILVERMAN: 3261. That's the only reference.

THE COURT: Here is what that says --

MR. PERSON: Also AC Chevrolet.

THE COURT: 3261:

"Did you have a source of supply for Buicks in the New York area?

"A Yes. We had Sharkey Buick then taken over by Cunningham Buick, and they refused to deal with us and we lost that source of supply.

"Q Do you know when that was?

"A In the spring of 1967."

Then Mr. Kleinbard moved to strike "They refused to deal with us," and Mr. Person said he didn't have any objection, and I said to Mr. Maiorana that he had a right to say that he ceased buying cars or that he was unable to buy cars without getting into what they said. The matter was not returned to.

MR. PERSON: He lost it as a source of supply.

THE COURT: We will say that is still in.

Even under the most liberal construction I'm telling you I'm not giving weight to that generally tossed in reference. If there are no more particulars on that of attempts to get cars and dates it is meaningless.

Let's get the Buick --

MR. SILVERMAN: The only problem complained of in Plaintiffs' Exhibit 699 with respect to this dealership is in October of 1968 and that's at page 0078 and it's Nabcor consecutive order 965.

THE COURT: That's right. They got cars from Sharkey in February, March and April of 1967, and if you were going to complain about orders that you tried to get placed with Sharkey and you could not, you should have had it in 699. That's the whole purpose of that exercise.

MR. PERSON: I didn't put in refusals to deal generally, that's when people refused to deal. These were specific cancellations that were in that package.

THE COURT: You have a lot beyond specific cancellations, and let's not get into any problem of interpretation in that regard. I understand, and I made this very clear on the record, that when you have a situation where there is a failure to make a commitment as in Buffalo, of course that is not included in 699, but this is not that situation. You were dealing with Sharkey. You were dealing, or your client was dealing, in February, March and April, and there is no testimony that there was a request of Sharkey for any kind of commitment. This testimony is meaningless under the circumstances.

MR. PERSON: I want to go back to that other point as to the meaning of 699. I don't recall that you wanted me to rewrite the complaint and put it in 699. I put in cancellations. That was the purpose of it.

THE COURT: The record is abundantly clear.

MR. PERSON: You are under the impression that 699 was what? I'm not sure. At least I will know what the new ground rules are.

THE COURT: 699 reflects all the situations -- whtat do you mean "the new ground rules"?

MR. PERSON: I am working under the old ones. I want to --

THE COURT: I want you to find the ground rules in the record.

Whether it's in 699 or not there is no testimony, Mr. Person, or no indication in 699, no indication anywhere else, of anything that could be the basis for a claim about Sharkey. Those things would have to be either a claim that there was an order that Nabcor had received that they tried to get Sharkey to fill and Sharkey would not fill it, or an order given to Sharkey that Sharkey sent back cancelled or going to Sharkey and saying "I want a commitment to sell me cars," or "I want cars," or some testimony besides that offhand statement on 3261.

MR. PERSON: Forgetting about that, because you have ruled on whether or not it's relevant, whether or not there is any evidence, but I want to be clear that my own understanding of the preparation of those sheets was in connection with specific cancellations that we were making claim with respect to, not refusals to deal where Nabcor had asked a dealer for example to supply cars and the dealer said no. I didn't include anything like that in there, and if a dealer had delivered the last car and stopped dealing with us that was not in there.

THE COURT: Yes, it is. It's in in the case of Bates and in the case of Ruckle. You cannot wiggle out of that.

MR. PERSON: Those were in connectionwith specific cancellations. I want you to recognize I'm not trying to wiggle. I'm trying to tell you the way I prepared it and that was that if there were cancellations --

THE COURT: You call my attention right now to situations where Nabcor had an order thta it was trying to place with a dealer and it got turned down and is not reflected in 699. Tell me about it.

MR. PERSON: That would be in here under those circumstances. In other words, if we had -- let me try ti delineate this.

THE COURT: I'll clear this up immediately. It seems to me I think we don't have to have any disagreement about this. 699, to my understanding, reflects situations -- we start with the idea that the log is supposed to be virtually complete about orders received by Nabcor that it needed someone to fill.

The second step, that 699 is supposed to reflect all situations where Nabcor received an order for a car or cars and was unable to fill them or fill that order because of some problem with a General Motors dealer.

The crucial part of my statement is, where Nabcor has received an order and is unable tofill it because of the conduct of a General Motors dealer.

I think that 699 is indeed complete in that respect on the premise that the receipt of orders by Nabcor is reflected in the log and I think you based 699 on the log.

Now, 699 is not intended to cover situations like this Buffalo, fll of '66 situations where there were attempts to get the commitments for cars, and if there were any other attempts to get commitments for cars it would not cover that either.

I've got to have some testimony that there was an attempt to get a commitment. That's the point.

Let's pass to Sharkey. There is not anything of either kind.

I also want ot talk to you about this item 5, the turn-downs in the '66-67 period, the so-called black list and white list situations. I cannot conceive that you can go down through the Luby, the Bates, the Midtown situations and rationally allege that the fleet allotment had the slightest thing to do with those refusals to sell as alleged. I don't know why we are talking about the numbers. The evidence doesn't have anything to do with the fleet certificate problem or an allotment problem for those dealers.

AC Chevrolet? There is not a lick of evidence

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that they were having a problem about a fleet allotment and couldn't get anything.

MR. PERSON: First of all, we have the problem of hearsay.

THE COURT: Tell me about Bates.

MR. PERSON: We have the problem with the hearsay.

THE COURT: I'm dealing with the problem on the record.

MR. PERSON: In Midtown we had a statement by Mr. Englert, as I recall, that Nabcor did not have a fleet certificate. That's the testimony by Mr. Maiorana.

THE COURT: Who said what?

MR. PERSON: Mr. Maiorana testified that Walter Englert said that Nabcor did not have a fleet certificate.

THE COURT: Did Bates bring up the fleet certificate? Did Bates --

MR. PERSON: We would not have had that in the record unless the dealership was the defendant.

THE COURT: Mr. Person, in the Bates situation they bought five cars in March of 1967, six cars in April of '67, four cars in May 1967, three cars in June 1967, and they ceased terminating business and there were three cars that were, I guess, ordered from Bates where there was not a filling of the orders. I guess we just don't know what happened to them.

Are you seriously contending that the failure to supply three cars was the result of not being able to get them out of a fleet allotment?

MR. PERSON: I don't see how a rational person can conclude anything else?

THE COURT: Tell me how a rational person can conclude that the failure to get three cars from Bates Pontiac on the evidence in this recofd related to having a fleet allotment for Nabcor.

MR. PERSON: There is evidence in the record that talks about the limited number of cars that a dealer is permitted to get. The dealer, as a result --

THE COURT: How about Bates? Was there evidence in the records about Bates being limited and not having enough cars?

MR. PERSON: Every dealer is limited to retail allotment. The dealers --

THE COURT: Were Pontiacs in short supply at this time?

MR. PERSON: This question of short supply is something that's not germane. That might be something that could be raised as a defense. They might have to specifically come in and explain what they mean by short supply, whether it's on a yearly basis --

THE COURT: Mr. Person, you have not got it. You just haven't got it.

What about Luby? Is there any reason to believe that Luby Chevrolet failed to sell -- I think the problem about Luby relates to three or so Chevrolets ordered in November, 1966 and then December 1966, and January '67. One a month ordered. Those were the three cars that they could not get from Luby. Are you seriously contending this was an allotment problem?

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MR. PERSON: The dealer is required to take these out of his own retail supply, and if he can't replace them out of the fleet allotment, then that would be sufficient justification for refusing to deal with Nabcor.

THE COURT: Did it happen here? Any slightest bit of evidence?

MR. PERSON: The inference to be drawn from the practice of the industry would be that these people had stopped dealing because of the fleet allotment in addition to whatever else.

THE COURT: Both, and you don't think this is inconsistent?

MR. PERSON: No. The white list, your Honor, shows that GM has a policy of not allowing resellers to get cars. That is what the evidence is, because the dealers were limited to the retail allotment. So long as the retail seller can't take down that volume of cars out of the fleet allotment, which is the policy of GM --

THE COURT: This is a frivolous argument.

MR. PERSON: It is hardly frivolous. It is the way the industry works. That is in the record, too.

THE COURT: I wish you would move now to the Buffalo situation. You explain that.

MR. PERSON: Well, if I could go on and take it point by point that Mr. Kaplan raised, since I am prepared to argue on the basis of what he said --

THE COURT: Fine.

MR. PERSON: I am not really as well-prepared to take on those specific things in the Buffalo area.

THE COURT: What do you mean by the specific things? In other words, you are not able to argue the fleet certificate in Buffalo?

MR. PERSON: It is only one and the document that you had in your hand last night that I took back early this morning is evidence of what goes on in that zone. On 339, the letter from Mr. Di Simone, the Regional Director of the Fleet Section in Philadelphia, to Mr. Olson, the Director of the Fleet Section in Detroit, indicates that Mr. Womack of theBuffalo Zone had told Di Simone on December 21, 1967, that a Chevrolet dealership was approached by a Nabcor agent, and offered to order approximately 200 passenger cars. It took place shortly after the 1968 model announcement day.

(Exhibit read.)

THE COURT: That shows the operation of the fleet allotment. The dealer only had seven or eight cars, and it happened to be Kem Dengler, but that is off the record. That is the smallest dealer of all those dealt with, out of six or eight cars a month he could not deliver the large number of cars, according to our witness he had agreed to sell, and he communicates with the zone and the zone tells him he only has six or eight cars a month, and therefore he goes back and says, "I am sorry, I don't want to deal with you," something to that effect.

THE COURT: Go ahead, I get your point.

MR. PERSON: The arguments were made that Nabcor was always able to get cars. That seems to be paramount in your mind. That is like the determining feature, Nabcor could always get cars, but I think something like that is very short-sided. It doesn't recognize the problems that there were in connection with these transactions. It really tries to oversimplify a very complex industry and make it so pat that it is reducing the whole case to a one-liner.

But Nabcor was not able to get the cars when it wanted these cars and where it wanted these cars. It switched from one area of the country in order to fill orders. The customers didn't move, they remained behind, so that the --

THE COURT: Generalities won't help me a bit. You tell me instances.

MR. PERSON: The shifting from -- I have to trace these things.

Let me try to make my two other generalized points on this.

We were not able to get the cars ordered. That is in reference to the demonstrator problem, or from whom the cars were ordered. That is when we lost the deal with one dealer and then for reasons that we are saying our white list and black list, were not able to get the cars from the people that we actually ordered them from.

So that it was true that Nabcor, even though they could get those cars there was a problem, and I am not saying it wasn't a sizable percentage where we didn't get the cars, nevertheless is inappropriate to make a conclusion that Nabcor always got the cars, and therefore there is no action.

Mr. Kaplan talked about the booklet or Mr. Kleinbard, I think, mentioned this booklet of Nabcor saying that the manufacturers welcomed Nabcor's presence, and that was the major reason why Nabcor shouldn't have a claim, because of some admission of something like that.

Well, Nabcor's presence really favored American Motors and Chrysler, the smaller manufacturers, and Nabcor had no boycott problems with those two manufacturers.

The booklet is for selling purposes, it is very general, it is not written with a knowledge about the GM marketing structure that came to light as a result of this case and the discovery we had. It really means that the factory with the better car would benefit from Nabcor.

I don't think you can take a statement in a sales piece and say there is no antitrust case.

THE COURT: What statements?

MR. PERSON: Mr. Kleinbard had said that this Nabcor training manual had a statement that Nabcor claims the manufacturers welcome Nabcor.

THE COURT: Let's pass that.

MR. PERSON: The statement that Nabcor obtained the overwhelming majority of cars ordered. This is working on a small profit margin and this was either by Mr. Kleinbard or Mr. Kaplan who argued point by point within the last several days, and I am trying to respond to the points they made.

THE COURT: I thought it was a statement from some manual.

MR. PERSON: I am just going strictly by own analysis.

THE COURT: I am with you.

MR. PERSON: I have taken down word for word what was said approximately.

We know many new car dealerships go out of business each year. The stopping of even a small percentage of cars from a business standpoint affects the business working on a small profit margin. You indicate saying 90 per cent deliveries couldn't have a disastrous effect with respect to the 10 per cent. The fact that we have had refusals by dealers and reordering, even though we did get the cars, it is still a problem, so the mere fact that we have statistics showing a certain number of cars were obtained, you have to take into account what Nabcor had to do to get the cars, the delays involved, and it isn't sufficient merely to take statistics and say that you ordered so many and got so many. I think that is very inappropriate, according to this case and any other

It doesn't take into account the drain on management time to cure these problems created. There is a lot of management time devoted in order to try to correct the problems that were presented, not because Nabcor asked for them, but because of interference with business.

Even though Nabcor could get new sources of supply, this still took time and involved delays, and I think you have to take that into account in terms of whether this is a jury issue.

2 For example, we talked about Oldsmobiles, 28 out of 31 were delivered. There were also problems of having to change from various dealerships, from Paragon to Rosenstock to Marty Motors in New York, and then from Krause to the Philadelphia area.

There were out of these 31 deliveries, a total of 20 delays in addition to the three -- out of these 28 deliveries there were 20 delays, according to the charts that I prepared. I think that is substantial interference. If you like to play with statistics, that shows there is something wrong here that we have 23 out of 31 cars having some kind of problem.

With respect to Colonial Cadillac, we have the Hartsough and Murray testimony and Frank Maiorana's testimony. We have the deal folders, two or three order forms, specific order forms that had been used at the outset when Nabcor finally prepared a makeshift order form. We had two or three of those in the record.

And the orders were telephoned in, there were communications during the period when Frank Maiorana and Nabcor were waiting for these orders in late December.

The offer to give Nabcor two cars to hold Nabcor over, the willingness of Colonial Cadillac to deal with Nabcor throughout, but the failure to get the cars, leads to the inference that the problem is as we have said before, that is the leasing allotment.

THE COURT: We will have to adjourn now. You be back here at 4 o'clock tomorrow.

MR. PERSON: May we state as late as it takes?

THE COURT: I think we can.

(Adjourned to December 3, 1976, at 4.00 P.M.)

NATIONAL AUTO BROKERS CORP., et al.

vs. 70 Civ 5 421A

GENERAL MOTORS CORPORATION, et al.

December 3, 1976
4:00 p.m.

Trial resumed.

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THE COURT: Mr. Person, you may proceed.

MR. PERSON: I would like to go back to that idea of the white list for one moment.

THE COURT: Sure.

MR. PERSON: It's to remind the Court that I have not made the statement that the fleet certificate was the only basis on which the white list operated therefore the question to Mr. Rock as to whether the fleet certificate was required in order to have a fleet operation was an irrelevant question in light of the proposition I set forth. I wanted to alert

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you to that. Do you see what I mean? What Mr. Rock was doing was confirming our theory in part.

THE COURT: Let me see. I think you have to explain that. I may know what you are talking about, but then again I may not.

MR. PERSON: It really is a simple fact of the evidence, and that is the fleet allotments were set up and we have evidence in the record on this in light of the demand that was developed through recognized fleet accounts, that is, what anticipated purchases there were from the recognized fleet accounts wound up as the fleet allotment and the fleet allotment was avilable to people who either had or qualified for a fleet certificate or persons who were in, or qualified to be in, the list of national fleet accounts, which was ten cars or more registered in their name.

So there never was any condition that a person must have a fleet certificate. That really was one --

THE COURT: What I conceive of as your argument is this: I guess you would say for each of the General Motors divisions there was such a thing as a fleet allotment, although in the case of Cadillac we have that testimony that it was called a leasing and rental allotment.

But in any event you would argue that at least there is a jury issue on this proposition, that there was no fleet allotment available to any dealer for selling to Nabcor or people like Nabcor, namely, resellers of cars, whether the sticking point was the fleet certificate or whetherit was just another type of general regulation that made it available only to users of cars as distinct from resellers.

MR. PERSON: I want to be very quick to say that the fleet section testified that there was no corporate policy as to whether the zones or the divisions were required to allow Nabcor to purchase from the fleet allotment. They were free to do what they wanted, and our contention is that they in fact did not allow --

THE COURT: I don't understand what you are saying.

MR. PERSON: The fleet section testified that there is no policy that they were aware of as to whether Nabcor or resellers were to be denied the fleet allotment. It was up to the zones or the divisions to do what they wanted.

THE COURT: All right. It seems to me that it's very clear from the record that the fleet section, as such, had this very limited role of issuing these certificates. The fleet section was something we have dealt with as part of the staff of General Motors.

MR. PERSON: Collecting the statistics for fleet users.

THE COURT: But I think you have just told me that they didn't determine the allotments carried out by the divisions.

MR. PERSON: They didn't have a policy that the divisions either had to give Nabcor cars or could -- either way. That was up to the divisions and the zones.

THE COURT: You are saying that each division had a policy and whatever they did with the fleet allotments it didn't permit a fleet allotment for a dealer to sell to someone like Nabcor. Is that right?

MR. PERSON: May I modify that?

There may have been times where Nabcor got cars out of the fleet allotment. There may have been. In other words, I'm not maintaining I can prove that in each and every instance. Some fleet orders went through. That's the reason I have to say that. Some orders marked fleet went through as fleet.

I have to assume in those cases orders were taken out of the fleet allotment.

THE COURT: I don't assume that at all.

MR. PERSON: I'm not saying in each and every instance Nabcor never got a fleet allotment. I'm saying there was not any right for Nabcor to get it and they didn't a lot of the time.

If one order went through, I'm not going to say that destroyed the idea that Nabcor was not allowed to get fleet allotments. It was not continually denied. Sometimes the dealers that put orders in for fleet got those orders through somehow.

THE COURT: I'm sure I have to get cleared up on this.

My impression is that by and large we don't have evidence at all about allotments in relation to specific transactions. We have evidence that orders were marked fleet in many instances. We have evidence that Nabcor got so-called fleet prices in the sense of getting low prices.

MR. PERSON: That doesn't necessarily mean they got fleet allotments.

THE COURT: Let me finish.

MR. PERSON: I'm sorry, your Honor.

THE COURT: We have evidence that in one case or maybe more cases Nabcor got a few fleet allowances. I'm going to say exactly what you started to say and that is that none of what I'm saying really deals with allotments. The allowances don't deal with the allotments.

I return to what I said a minute ago. I don't understand that there is really any evidence at all -- and I mean it. I don't understand that there is any evidence at all about the subject of allotments in relation to cars purchased or ordered by Nabcor, and, as I sit here, this seems to me a fairly serious proposition.

In other words, it seems to me it would be possible to adduce proof if in any given transaction there was some relation to a fleet allotment.

In other words, let's suppose that Nabcor ordered ten Oldsmobiles from Rosenstock Oldsmobile in November of 1966.

Let's suppose that this was a time when Oldsmobiles were in short supply and Rosenstock could not provide those cars out of its so-called retail allotment.

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THE COURT: Let me go back. Let's suppose that Nabcor ordered some Oldsmobiles from Rosenstock in November of 1966. Now, if there was some relation to a fleet allotment question, I would expect to hear something like the following line of proof, I don't know what it would be because I never heard sush a line of proof, but I would expect to hear something like this:

I would expect to hear that the cars were in short enough supply to make the allotment come to bear. I guess I would expect to hear something perhaps like the fact that Rosenstock could not supply these cars from its retail allotment and that Rosenstock sought to supply these cars from its fleet allotment. And there was such a thing called the fleet allotment at this time for Oldsmobiles. I would expect to hear something about what that allotment was at this time.

I would expect to hear something like the fact that the fleet allotment wasn't big enough to hear about these 10 orders and they had to try to get a special allotment for Nabcor to get these cars.

That perhaps they requested such allotment from General Motors and were told, "Sorry, Nabcor is not anyone for whom we are willing to issue a fleet allotment or cars under a fleet allotment."

I am saying to you, Mr. Person, that there are lots of variations, but, depending on what happened, but if you are talking about fleet allotment having an effect on any transaction, that is the kind of thing or even at least a little bit of it, that I would expect to hear.

I can't remember hearing anything about the relationship of allotment to these transactions. I heard a lot of testimony about allotments in the abstract.

I certainly saw the charts and heard the testimony about the fact that at Ruckel they listed these cars as fleet orders, but Mr. Dillon was on the stand and said, really, "I got all the cars I wanted. I don't know what difference it made. I never was concerned with allotments."

He got all the cars he wanted.

MR. PERSON: But he also said that he bought cars with a fleet certificate. That was it.

THE COURT: Please don't shift. Address yourself to my point. You tell me what evidence there is in the record aside from general industry practice and a lot of these other generalities. What is there, show me that in a specific transaction, the allotment problem even came to bear.

MR. PERSON: Several things. No. 1, I was trying to show you the evidence in the record that permits the inference, the conclusion that the fleet certificate --

THE COURT: That is not my question.

MR. PERSON: That leads to the fleet allotment. When the dealer said --

THE COURT: Please, I have no time to wander way back. I want you to answer my question directly and that is, tell me what evidence there is about allotment problems, allotment questions coming to bear, being applied in an individual transaction.

MR. PERSON: I think that is jumping too far, because the term --

THE COURT: I am jumping that far, I have jumped. Maybe that is not the right question, but at least it is a question and I would like an answer.

MR. PERSON: As I recall, Stewart had testified that they needed the fleet allotment to get extra cars.

THE COURT: Did he testify the reason they did not supply the last nine orders was that they didn't have enough cars and they --

MR. PERSON: No.

THE COURT: And tried to get a fleet allotment and couldn't?

MR. PERSON: No, he did not, but orders were submitted, the last orders were submitted stock and they changed that method of ordering from fleet so that --

THE COURT: I didn't even know that was your contention that the cancellation of the nine had something to do with the failure to get an allotment. I thought it was your contention --

MR. PERSON: That is the white list problem.

THE COURT: It is an alternative theory. If you lose on the one you throw in the black list.

2 MR. PERSON: It is a cumulative theory. The dealer was still willing to sell cars to Nabcor in spite of his inability to take the cars out of his allotment, and that is where the black list comes in. There had to be a certain overt act against the dealer at that point, that is the Ruckel situation.

THE COURT: That is a very, very neatly contrived conspiracy starting with, say, you can only sell them out of the fleet allotment and you can't sell them because they don't have the fleet certificate.

MR. PERSON: If the dealer is using the

retail allotment to supply the reseller for resale at very low prices, the dealer could not stay in business. Therefore, it is economically impossible for the dealer to give any substantial number of cars to the reseller.

THE COURT: I will give you one more chance, and if you don't answer my question now I will regard this as tantamount to a concession --

MR. PERSON: I won't concede.

THE COURT: There is no evidence on the record about allotment problems coming to bear in any way on a specific transaction of Nabcor. I mean specific evidence about a specific dealer in a specific transaction.

I think my question has meaning, I think I phrased it in plain English, I think if there is evidence you could give it to me. I ask you again, one more chance.

MR. PERSON: Well, if I can't use the term "fleet certificate" and show it means fleet allotment, or can use fleet order showing it means fleet allotment, you are limiting it to somebody using the fleet allotment, I gather?

THE COURT: I am sitting here waiting for an answer. I know you have intelligence and understanding.

MR. PERSON: I know what you are saying.

THE COURT: If there is evidence, you can give it to me. I am not tying it to specific phraseology. I am talking about evidence relating to a specific dealer in specific transactions. I am waiting.

MR. PERSON: Well, Kline Pontiac refers to the fleet allotment. There is an exhibit which showed the holding up of cars because Nabcor was not entitled to a fleet allotment. Then the cars were subsequently released, the diversion of a car. That is one thing.

THE COURT: Kline Pontiac.

MR. PERSON: I can give you some document numbers on that. Document No. 112. That was a letter from the Assistant Car Director of the Pontiac Philadelphia Zone to the Zone Manager, Mr. Ware, regarding Kline Pontiac, and there was reference to an order submitted by Kline Pontiac.

THE COURT: Let me see it.

Is this in evidence?

MR. PERSON: Yes, it is, your Honor.

THE COURT: That is an answer. It does say that Kline had apparently tried to classify some

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orders -- wait a minute, the memo starts out by the eligibility of claims submitted. I don't know what the claims were.

MR. PERSON: Fleet rebates. We would stipulate it is a fleet rebate claim.

MR. KAPLAN: Yes.

THE COURT: I see. Then the memo goes on to say that the fleet account name was not given and then the statement was made that Kline was told that we would be unable to process this order and subsequent orders under our fleet program unless a fleet customer's name was given, and this order and all following orders would be processed as regular retail orders counted against his normal allotment.

So far as I can interpret the document, the jury could interpret the document as referring to two subjects, namely, the fleet rebate and the allotment question.

Now, did this prevent Nabcor from getting any cars? I see the memo as far as it goes. Ig certainly answers my question.

MR. PERSON: May I add another point? That is at 1985, lines 17 to 24, Urso stated that it would make a difference between a leasing company because otherwise the cars would have to come from the retail allotment.

THE COURT: That is general practice.

MR. PERSON: That relates to Bano Buick, though. That is what Bano Buick was faced with the fact that these cars were coming out of their allotment.

THE COURT: Did Bano stop selling?

MR. PERSON: When companies did stop selling the same practice, that is, the industry practice that must be read into the context of the transaction.

THE COURT: We are way, way beyond that kind of talk.

Now, I go back to the question and you started to answer with Kline.

MR. PERSON: Buffalo is another. There are some more documents, 110 through 113.

THE COURT: Just a minute. There is no claim about anything relating to Kline in your Exhibit 699.

MR. PERSON: I believe that exhibit was referred to in 699, I thought.

THE COURT: It isn't.

MR. PERSON: That group of four or five numbers, but not as a car that we didn't receive.

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(Pause)

THE COURT: I see these documents, 110, 111, 112 and 113. I guess they really deal with the question of a discount or an allowance.

I see the language you are referring to, and my question would be whether they caused any failure of supplying cars to Nabcor because of the inability to get enough cars but there is no indication of that.

As far as the delays, when were these delays? I guess in the period January through April. What would you argue? That there was some effect?

MR. PERSON: There was. This is far more important to show that there is a fleet allotment and it is not --

THE COURT: If we had another case it would be very interesting, but I'm dealing with a claim under the Clayton Act, injury to -- whatever the language is -- business or property.

MR. PERSON: Injury to business or property.

THE COURT: That has to be something in the words of the statute. If you have just an abstract interesting proposition that did not cause damage to business or property, I can't send that to the jury to

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simply cogitate over the abstract prioisutuib,

MR. PERSON: It's not abstract.

For example, Douglas said that the reason that Bonfield in Queens City should not be selling these vehicles to Nabcor is that Nabcor did not have a fleet certificate. And Englert said Nabcor did not have a fleet certificate.

What I'm saying, this fleet certificate-fleet allotment problem is identical, and the reason the dealers stopped dealing with Nabcor is the result of not being able to get the fleet allotment to replenish the retail allotment.

THE COURT: Let's not have any more general statments. You see if there are any instances besides Kline that you want to refer to as instances where you have evidence that an allotment problem came to ber on specific transactions. I'll be back with you. I have to take a phone call.

(Recess)

THE COURT: Do you have any more instances?

MR. PERSON: The Buffalo instance, Exhibit 339, which you looked at the other day. The dealer in Buffalo with seven or eight cars.

THE COURT: Anything else?

MR. PERSON: Going back to Kline Pontiac, the four out of five cars that were the subject matter of this document in Plaintiff's Exhibit 699, I guess it is, wound up on the delay exhibit, 714 for identification. No. 789 was a 64-day delay; No. 803 was a 77-day delay; No. 817 was a 108-day delay; No. 831 was a 79-day delay.

THE COURT: What else?

MR. PERSON: This, of course, could be traced to the individual brokers on Exhibit 715 -- which brokers were affected by the delays.

You've seen the Buffalo papers.

Colonial Cadillac is something that has to be continued with just another statement, and that is that it's interesting to note that leasing companies were sold cars out of retail. Mr. Kaplan, I believe, brought that up yesterday. It's interesting to note that they wold cars when they are able to get a fleet allotment, so that by getting the fleet allotment then Colonial could sell cars out of retail. Since we got no fleet allotment we could not be sold cars out of either. The inference is that.

THE COURT: Your theory is that if Colonial could get an allotment for a customer, then it

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could go ahead and sell it out of retail now because it knew it could get --

MR. PERSON: Not even that. Just as a means of averaging out, they could give us some ofthe retail if we had some fleet to supplement their sales so that if half the cars we had ordered had been received out of fleet then the other half could have been sold out of retail.

In other words, the fact that Colonial sold cars at retail to leasing companies is a result of the fleet allotment that was made available to the leasing companies.

We had the Urso testimony, the Stewart testimony.

THE COURT: It is not evidence. I want to know transactions that were influenced by the fleet allotment problem.

MR. PERSON: All of the Cadillac problems.

THE COURT: I understand your position on Cadillac, and I think you allege that beyond that one dealer in Buffalo all those refusals in '66 were caused or related to this fleet problem.

MR. PERSON: I do not say totally caused it. It's part of it. The black list element goes in there.

THE COURT: You want to rely on both theories?

MR. PERSON: They're both very good theories and I think that's the way it happened. I think when a dealer could sell out of retail, if he thought he could sell out of retail and did, it took the black list theory to keep him from doing that. The white list theory stopped Nabcor from getting a sufficient supply of cars and that's why the dealer stopped selling.

THE COURT: The dealer was not thinking of the theories.

MR. PERSON: Believing that Nabcor could get a fleet allotment, they would make a commitment and order the cars. When they could not get the cars then they realized they were making sales out of the retail part of their business. In doing that they had to decide whether or not to continue. Some did and others did not.

THE COURT: Let's go on.

MR. PERSON: There is other evidence --

THE COURT: Don't tell me about other evidence in general. What other specific transactions do you have evidence that were influenced by the allotment problem? I repeat to you, it takes specific evidence. Otherwise it's a matter of speculation.

I won't argue with you about that. I want to know what specific evidence you have.

MR. PERSON: Midtown's reference to the fleet certificate.

THE COURT: No, no. Did Midtown have insufficient cars? Of course not. They had these cars on hand.

MR. PERSON: These cars being on hand were not offered to us.

THE COURT: If it happened the way you say, it would be purely your boycott or black list problem.

MR. PERSON: That as well as the white list.

THE COURT: Tell me any evidence about Midtown about an allotment problem coming to bear.

MR. PERSON: Englert said we didn't have a fleet certificate.

THE COURT: I reject that as evidence of what I'm talking about.

MR. PERSON: In other cases I may have one or two more instances.

THE COURT: It's time now to give them to me.

MR. PERSON: I may be able to do that as I go along.

THE COURT: Right now. This is it.

Next point.

MR. PERSON: Urso has additional testimony at 2021. He gave the letter withthe ten cars listed to get extra cars. That's in Bano Buick. That's additional testimony.

Then we have testimony by the GM officials that tie in the fleet --

THE COURT: No, no. Specific transactions.

MR. PERSON: No more that I could recall.

THE COURT: Let's go to the next point.

MR. PERSON: No more than I can recall now. There may be some additions.

The thing to remember, we have this proposition which I think is the way the jury would find it, assuming we ever get to a jyry, and that is that the '66-67 period was critical for Nabcor. It so happens that 166 or Nabcor's orders had come in during the period preceding January 1, 1967.

THE COURT: What was that number?

MR. PERSON: 166 of Nabcor's orders drawn from the log, actually were other addition s.

THE COURT: Prior to what date?

MR. PERSON: January 1. From 7/66 through 12/66 inclusive.

I argue that this shows there was a far greater demand by Nabcor during that period on dealers than any other peiod which, once again, suggests the need moreso then than later for the fleet allotment to be able to allow the dealers to meet their commitments without reducing their retail supply. That's a pretty good inferential proposition.

THE COURT: Let's pass that. I thought you were going to get to something else now.

MR. PERSON: The volume sales never returned to Nabcor so they were on an attempt to salvage their business. There were franchise sales --

THE COURT: Everything you say is so tantalizing. The volume business never returned --

MR. PERSON: It's true.

THE COURT: I think it would be very interesting to analyze the placement of those orders and see what happened to those 166 orders.

MR. PERSON: That's the Bates, and Midtown,

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and --

THE COURT: Let's analyze them and see whether a fleet allotment was needed to supply those orders. We could spend literally days discussing these propositions, and I don't have the days, but, again, it is so tantalizing because I would love to go through and be specific, and that's what you would have to do, Mr. Person. In order to analyze I will have to do that over the weekend --

MR. PERSON: I would have to do that to see if there is anything to this proposition. I will take those 166 cars and I will go through -- I don't know that I will -- but I would have to go through and I would have to see, is there any evidence that a fleet allotment was necessary to fill any of those orders? Is there any evidence that any of those orders were denied or not filled because of a lack of a fleet allotment? And I would do it.

It has to be done in a meticulous manner tracing: Were the 166 orders placed with one person at one time or was it dribbled out over different periods of time? And so forth.

You want to do that?

MR. PERSON: I will do that.

THE COURT: Right now. Do it, otherwise this general statement is meaningless. You do it.

(Pause)

MR. PERSON: The orders I'm referring to are from 30037 through 30041.

THE COURT: Give me names, just names.

MR. PERSON: I can count out the number of cancelled orders on these first pages that include all of these 166 or 167 orders that I referred to.

THE COURT: Mr. Person, the way I would think I would have to approach it would be to take the orders that you say were not filled and then look at the date, the number of the orders, the dealer, how they were spaced, and then I would say I would like to see the evidence, that that had anything to do with the lack of a fleet allotment, or whatever is the right phrase.

You want to do that? Otherwise I cannot deal with that general proposition.

MR. PERSON: All I can do at this second is to say that the evidence that we have is no more than what I have stated. I will not add any more other than the fact that I pointed out that a very large percentage of Nabcor's orders came in in a very short period of time.

THE COURT: We will pass that. No use going any further with that 166 order statement.

Let's go to the next one.

MR. PERSON: 16 cancellations appear in the first page and approximately the same amount appear on the second page and so on. So there is a high percentage of cancellations.

THE COURT: I can't deal with pages.

Next one.

MR. PERSON: 699 does not reflect cancellations that are due to delays, cancellations that we are not able to identify. There are various cancellations in the log that are not attributable to anything in 699 where we are able to specify why the cancellation occurred.

The high percentage of delays that are --

THE COURT: Let's go back slowly.

699 does not reflect what?

MR. PERSON: The cancellations from customers that we can't identify were caused, specific cancellation that was caused by a delay. The records don't reflect that. All we have is Mr. Maiorana's testimony that a substantial percentage of these cancellations were caused by delays.

THE COURT: That's not enough. It's

meaningless.

MR. PERSON: The delays that we had would result in cancellations. It's a normal inference to be able to accept that. There comes a point at which people are no longer willingto wait and therefore a certain number of these cancellations that otherwise are not explainable result from the delays. This is according to Mr. Maiorana's testimony, about half of them.

THE COURT: I'm willing to just go very slowly, very, very slowly.

You explain this delay point and you explain it in relation to cancellation. You point out instances where delays resulted in losses of orders, and then you tell me about the reason for the delay.

Take it one at a time. Just one at a time.

MR. PERSON: I can't identify a specific order by number for which the delay caused the cancellation if it is not set forth in 699.

THE COURT: I really can't use that. If you made that statement to the jury I don't think -- I will say right now I will not permit a jury certainly to award damages on that kind of statement or that kind of evidence.

MR. PERSON: On a destruction of business basis.

THE COURT: It's too vague. It does not tell me nor does it tell the jury how many orders were involved. It does not tell me anything about the time. It does not tell me whether they were Chevrolets, Cadillacs, Oldsmobiles, Pontiacs or Buicks, so that I could possibly relate it to the overall volume of business.

I could go on and on telling me how much it does not tell me.

All right. If you can't give me the specifics let's go to the next point.

MR. PERSON: Those figures are in the books. We know how many orders were marked cancelled in Plaintiffs' Exhibit 450; each of the exhibits of the defendants in a book, the car books, state how many orders are marked cancelled.

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THE COURT: Let me understand this. There are, of course, entries in Exhibit 450, where it says cancelled.

MR. PERSON: Right. And the only explanation for many is the delays.

THE COURT: Do I understand that 699 does not include all the items from 450 where the word "Cancelled" appears?

MR. PERSON: That is absolutely correct. Only where I could identify what specific refusal had resulted in that. Other than that, I put in Kline Pontiac because I just saw the document and added it, and remember it, and the delays that resulted from the cross dealers. Those involved obvious delays when Mid-Town and another dealer switched.

THE COURT: You thought you included that as an afterthought.

MR. PERSON: I put in the delays at this point when I was compiling the statistics. That is why the delays even crept in at all, to account for the problem of Mid-Town refusing, another dealer coming in, and the car ultimately delivered. That is the reason the delays crept into the figures.

In other words, you are saying that 699 has some things in it, but there are other things that you are complaining about which you specified and are now specifying and there are instances where the customer cancelled because of delays and those instances are not included in 699?

MR. PERSON: No, they never were intended to be at all.

MR. KAPLAN: I object to any such claim being asserted or even spending any time on it. Mr. Person said time and again and one of the places is 2925 that 699 included every cancellation of which complaint was made in this lawsuit and stated at 2925 in response to your question as what these papers were, "These represent the transactions which we complain about, that is, essentially cancellation of ordered automobiles resulting in loss to the Nabcor system."

I am sure I can find any other number of references. Your Honor made clear that 699 was to be every cancellation of which the plaintiffs complained in this case.

MR. PERSON: We were in this deal, talking about refusals by dealers, and cancellations resulting from that, and that was the basis on which I prepared that chart.

THE COURT: I think the net of it is -- I have no doubt that the record reflects exactly what Mr. Kaplan has stated, because this was my understanding. I will review the record and if Mr. Kaplan is giving me an incomplete citation --

MR. PERSON: Remember, your Honor, when I said I was waiting for Mr. Kleinbard's statistics to be able to show delays? I was waiting --

THE COURT: I won't let you wait.

MR. PERSON: But that is when I was --

THE COURT: Let's not pause on that, but the point is that --

MR. PERSON: I wanted to use his statistics to show that.

THE COURT: You have instances in 699 where the cancellation came from the customer. You do not limit 699 to the situations merely where the cancellation is made by a dealer.

MR. PERSON: That is the A.C. demonstrator problem.

THE COURT: I beg your pardon? One of those items is the Kutner Buick, 339.

MR. PERSON: That was a different car, the demonstrator car, different than the car we ordered.

THE COURT: Let's not pause. The fact is on this delay point resulting in cancellations you are not able to give me a single specific --

MR. PERSON: No, I am not able to.

THE COURT: Let's go on, no specifics.

MR. PERSON: Witnesses testified --

THE COURT: Next point.

MR. PERSON: The Subaru Cadillac order, about the last four cars were included and were ordered within the limiting period and because of the problems that we complain about the damage occurred at that point. In other words, the fact that we placed the orders with somebody who ultimately was not going to deliver, even if the ultimate non-delivery occurred outside the period.

THE COURT: Why were the non-deliveries made?

MR. PERSON: Just refusal to deal.

THE COURT: Just refusal to deal? Where is the evidence?

MR. PERSON: I guess I should not even have brought this up. I don't think the record reflects that.

THE COURT: I don't think it does. We better pass that.

Do you have any other arguments?

MR. PERSON: I am trying to skip over those things that are obvious to you.

The claim is that an admission that some dealers could refuse to sell to Nabcor because of self-interest is not really an admission that means anything. I hope I don't have to argue this point.

There are others that dealt with us and it was obvious from their standpoint they were interested in dealing with us.

THE COURT: I think you can pass that.

MR. PERSON: There were many dealers that did know that Nabcor was a reseller in spite of a certain amount of evidence that they indicate to the contrary in this case.

That is the question of the fact as to whether Nabcor was known by and large as a reseller. I don't think it is clear at all that the several instances, for example, Colonial Cadillac, that letter had the word "leasing." That is an aberrational circumstance. Nabcor always made clear and the jury could find that they attempted to let the people know --

THE COURT: Certainly if that were crucial that would be a jury question.

MR. PERSON: Then they even continued to deal with Nabcor at the point where it became obvious, Colonial Cadillac for example, they continued to deal with Nabcor, and that was very clear, Murray testified.

I think the fleet rebate problem should be considered to the extent that it activates an opportunity for the zone to have contact with the dealer about the category of Nabcor.

And subsequent to that when changes occur, that inference can be that these changes result from that contact between the zone and a dealer, specifically Rohrer Chevrolet.

THE COURT: Any others?

MR. PERSON: I can't think right offhand. I don't think we have anything on Al's Community Oldsmobile, so that the evidence that we have in there coesn't support anything with Community Olds. There wasn't anything on Community olds to complain about.

I am not claiming anything there, but this evidence does show the factory was looking at Nabcor and discussing problems with the Motor Vehicle Bureau.

The factory had written down various points about communicating with the Motor Vehicle Bureau concerning Nabcor and the alleged ability to register cars in New Jersey.

In Rohrer Chevrolet, that is the only example that I can think of at this time, but it was followed up, there was a contact with Speece. Speece was found wandering around the halls at some point, which is not well defined. Hilda Madden was unclear when that occurred, but that was an unusual circumstance to see Speece and also there was a document -- let me go back to the background for Rohrer Chevrolet.

That reminds me that Bolling told me last night that when he testified that the original orders had been submitted to Nabcor, he said that is a correction. He had submitted the original number of orders that he had to Nabcor and that was not the same bunch of orders they were carrying around, it was a different bunch, so when you ask me to explain an apparent inconsistency in testimony, his testimony is that at the outset as a broker he had taken the first orders submitted to Nabcor and I find a submission as early as September of 1967.

THE COURT: Let us just go through that. Let's get the testimony and the record.

MR. KAPLAN: Page 2149 of the transcript, Bolling was asked and testified as follows:

"Q What is the total number of orders that

Multi-Make obtained?

"A I would say 25.

"Q Did you turn those in to Nabcor for Nabcor to fill?

"A No, sir, not all of the orders we did not turn in.

"Q How many did you turn in to Nabcor?

"A I would say the original eight or ten that we transferred over to General Auto Sales.

"Q You are saying the original eight to ten were given to Nabcor?

"A The first orders that we took when I opened up Multi-Make I placed with Nabcor and brought over to General Auto Sales & Leasing.

"Q What about the other 15 to 17 orders?

"A Those orders were held in lieu of obtaining the distributorship and using the orders to set up our local supplies."

THE COURT: I think Mr. Person is going to show us in the log records which show that there were two stages of orders to Nabcor, one a first group that refers to Mr. Bolling's testimony under 2140 and so forth, and then a second group which is the one he was talking about in his cross-examination by you when he said that he submitted orders at a later stage.

MR. KAPLAN: I would be fascinated to see that.

THE COURT: Let's find those two groups.

MR. PERSON: I have one, 125-1 is his order number, he is broker 125. Order No. 1 is the Nabcor record, September 18, page 50, line 26.

THE COURT: I am sorry, give me that again. What is the date of the order?

MR. PERSON: September 18.

THE COURT: That is the first order.

MR. PERSON: Correct.

THE COURT: And the second order?

MR. PERSON: October 19. Now --

THE COURT: When was the third order?

MR. PERSON: 11/13.

THE COURT: What about the fourth order?

MR. PERSON: All those are together, three more together with that.

THE COURT: Just give me the orders.

MR. KAPLAN: All the rest are on November 13.

MR. PERSON: Except the last one on November 20.

THE COURT: Go through it without interruption and give me all the orders.

MR. PERSON: No. 3 is 11/13; 4 is the same; No. 5 is the same; No. 6 is the same, and 7 was a reorder of an earlier car.

THE COURT: There was an 11/20?

MR. PERSON: That is a reorder of the Schmidt Corvette, which was an earlier number.

THE COURT: Let's go back. Read what Mr. Person said at the beginning of this.

(Record read.)

THE COURT: Mr. Bolling told you about two different bunches. Where are the two different bunches?

MR. PERSON: I believe in looking at the log that what he called a bunch would be one, and that would be the first one or two orders. That is the bunch in terms of what his memory is.

THE COURT: What bunch is the first one, on September 18, or the first two?

MR. PERSON: The first one or two would be the bunch that he is referring to. Apparently only the first one, although I can't really understand the swing deal, which would be the second transaction.

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THE COURT: He didn't say at 2140 he submitted one. I think it is fortunate he wasn't under oath last night.

MR. PERSON: I didn't ask him other than to say what you had said. All I did was ask him about his testimony.

THE COURT: It is not an explanation.

MR. PERSON: There were orders, at least one or two orders, the Vossaler Chevrolet and the Strimple Chevrolet had been received in Buffalo by the time of Frank Maiorana's meeting with Belcher.

THE COURT: So?

MR. PERSON: These were orders from Rohrer Chevrolet. Prior to meeting with Mr. Belcher -- I am sorry, Rohrer Chevrolet made a fleet application to the Chevrolet zone. That was in November where they listed some numbers of cars that had been shipped by Rohrer to Nabcor.

This came before the meeting with Mr. Speece and Mr. Di Simone with Anthony Maiorana, which was one or two days before the Belcher meeting.

The Speece and Di Simone meeting, therefore, came after the shipment of cars to Buffalo, those two Chevrolets came after this fleet rebate refusal or at least turning in --

THE COURT: This Speece and Di Simone meeting was when?

MR. PERSON: With Anthony on 12/13/67, and it came after the memorandum by the assistant zone manager in the Philadelphia zone, Mr. Courtney, Exhibit 247, in which Mr. Dunham --

THE COURT: Can I see 247?

Courtney is with the Philadelphia zone of General Motors?

MR. PERSON: Yes.

THE COURT: Of Chevrolet.

(Pause.)

THE COURT: This relates to rebates, doesn't it?

MR. PERSON: It's an attempt to alert the dealers about Nabcor.

THE COURT: Alerting the dealers about Nabcor for what purpose?

MR. PERSON: The fact that they alert the dealers at all is something that is evidentiary.

THE COURT: Sure it is, but there is a purpose clearly manifested in the memo and that relates to the fleet plan or rebate.

MR. PERSON: We have to take this into context with a meeting that occurred on the next day between Speece, DiSimone and Anthony Maiorana. The reference is here thatthey're going to send one or more persons out to communicate unannounced with the account or with Nabcor.

THE COURT: Fine.

MR. PERSON: This occurred on the following day. This is where Speece, a member of that zone, dropped in, so that the conversations that occurred at that meeting have to be taken into account when analyzing what that exhibit means, or at least something the jury should consider.

THE COURT: All right.

MR. PERSON: This Exhibit 642 has at least two cars on it that were delivered to Buffalo. Exhibit 642 has the Pemberton Chevrolet --

THE COURT: These are the Rohrer Chevrolets, Pemberton being the customer?

MR. PERSON: Yes. This was a customer up there. The car came back. It has the Pemberton automobile, and 39241, the last serial number, and there may be also the other vehicle --

THE COURT: What is the point?

MR. PERSON: When we complained about the serial numbers being traced, that is the cars that were delivered to Buffalo being traced, we have evidence right here in the zone about the vehicle that had been delivered from Rohrer Chevrolet to Nabcor and this was prior to the meeting with Belcher and also prior to the meeting with Anthony Maiorana.

THE COURT: So?

MR. PERSON: That is background for it.

THE COURT: What happened as a result of the meeting with Anthony?

MR. PERSON: At that point Anthony Maiorana -- the following day after the meeting Frank Maiorana complained about cars being held up by the Chevrolet zone.

THE COURT: Complained to who?

MR. PERSON: Mr. Belcher.

THE COURT: The date of the Belcher meeting was when?

MR. PERSON: 15th of December, 1967, one two or two after the Anthony Maiorana meeting.

And also another vehicle that was delivered to Buffalo is on this form, 42742, just to add that. But there were some cars that had been ordered by Nabcor from Rohrer that were not delivered until February that were already on order and being held up in December. Some cars had been delivered also, but some cars, according to the testimony of Anthony Maiorana, were being held up.

THE COURT: What testimony is that?

MR. PERSON: 1735, line 5. 1736 --

THE COURT: 1735? Let's get it.

(Pause)

MR. PERSON: Also at --

THE COURT: What does it say?

MR. PERSON: Cut off at Rohrer. He's more specific. Rohrer had stopped the cars Nabcor ordered. And 1736, line 17 --

THE COURT: I don't see anything on 1735 about holding cars in December that were not delivered until February. There is just nothing there.

MR. PERSON: 1736, line 17, there is nothing at that point?

THE COURT: The allegation is that they stopped selling or just they stopped Chevrolets and then -- 1735, a month or so they stopped the Chevrolets and that is it. They shut it off in January of 1968, and then --

MR. PERSON: 1751, line 14, your Honor, or 17.

THE COURT: Your question was:

"Q Was Nabcor unable to obtain to obtain delivery of automobiles from Rohrer at the beginning of 1968?

"A Yes."

You made a very specific allegation that Rohrer had received certain cars for Nabcor in December of 1968 that they held and did not deliver until February. That is something different and additional from simply saying they refused to sell.

MR. PERSON: They're holding up the cars.

THE COURT: Where is the evidence they had the cars and were holding up the delivery of them?

MR. PERSON: Nabcor was unable to obtain delivery at the beginning of '68.

THE COURT: Somehow it does not follow.

MR. PERSON: 1752, line 5, is another reference to that.

THE COURT: Rohrer had three cars there. I didn't see that before. I get your reference.

MR. PERSON: We can identify those three cars fromthe record, and that is that they were one car that was ordered from Rohrer on November 13, 1967 and delivered 2/26/68. That's the Chevrolet. That was a 105-day delay, ordered by Nabcor. It was a Multi-Make order.

THE COURT: Ordered by Nabcor from Rohrer?

MR. PERSON: Yes.

THE COURT: When?

MR. PERSON: 11/13/67.

THE COURT: Delivered?

MR. PERSON: 2/26/68.

THE COURT: We'll take a short recess.

(Recess)

THE COURT: When didthe customer order it from Multi-Make?

MR. PERSON: That was November 13, 1967, received by Nabcor.

THE COURT: When did the customer order it from Multi-Make?

MR. PERSON: I will have to go into --.

THE COURT: Don't you have that?

MR. KAPLAN: There is no evidence of that.

THE COURT: The evidence is that he took it the first month of operation and that was in July.

MR. PERSON: It's unrelated to the present problem.

THE COURT: If Mr. Bolling held the order from July to November it's a little strange to worry about a delay from November to February.

MR. PERSON: I'm trying to show interference with Nabcor's business. We didn't say this car had not been --

THE COURT: I get your point.

MR. PERSON: On 11/21/67, Broker Rump ordered a car, or Nabcor ordered a car, from Pohrer. It was received March 5, 1968, 105 days later. That was order No. 462.

THE COURT: It was delivered when?

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MR. PERSON: March 5, 1968.

THE COURT: That's another 105-day delay?

MR. PERSON: Yes.

Received by Nabcor 11/21/67.

THE COURT: Are there any other orders you want to refer to?

MR. PERSON: One other.

Nabcor consecutive order 465 Alf-Lex order delivered 2/23/68.

THE COURT: When was it ordered?

MR. PERSON: 11/28/67. That was an 87-day delay.

THE COURT: Proceed.

MR. PERSON: The log states 2/26/68, and I have information on delivery of --

THE COURT: Never mind that. That's immaterial.

MR. PERSON: At this pint these were the cars as far as the record shows that were not delivered.

THE COURT: I see.

MR. PERSON: Insofar as that meeting -- the testimony about Mr. Anthony Maiorana about the meeting-- there was an admission we claim where Mr. Maiorana testified that they told him -- they being Speece and

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DeSimone -- that Nabcor was not qualified to buy cars to resell, 1640, line 4. That's an admission, we claim.

Also that Nabcor shouldnot be selling cars; to be fleet buyers Nabcor would have to have 30 cars kept at least six months, and registered in Nabcor's name.

Nabcor was not allowed to sell them as new cars when Nabcor bought them.

Also Speece said "The dealers would not sell to us any automobiles to resell." And also "They would see to it that we would not get cars to resell," 1642, line 19.

On cross, 1728, line 9: Speece and DiSimone said that Nabcor could not get cars without a fleet certificate.

THE COURT: Cross of whom?

MR. PERSON: Cross of Anthony Maiorana. They said that Nabcor could not get cars without a fleet certificate.

The explanation, once again, of why Nabcor was able to get cars to the extent that it got cars, and the way it got cars, is attributable to the white list, that is, the cars they got were out of retail

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rather than fleet, and I believe that this testimony, or the admissions, can be construed to be either in support of the white list or black list argument and it may be the white list argument that it supports.

THE COURT: It's going to give me a very rough weekend trying to figure out the relationship between the white list argument and the black list argument in each of these transactions. I have such a plodding mind that I kind of approach it that way.

MR. PERSON: Your mind is very sharp, I'm sure. You are going to grasp it immediately.

THE COURT: In other words, in order to prove my intelligence I have to grasp your arguments?

Seriously, the Speece and DiSimone thing --

MR. PERSON: The white list argument is no more than the factory not allowing Nabcor to get a sufficient volume from any one dealer unless Nabcor met the requirement for volume purchasing. This left Nabcor to whatever retail cars the dealer was willing to sell to Nabcor, and this explains why Nabcor could get cars to some extent from retail and it also sets the stage for the black list, that is, that the English situation --

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THE COURT: You started withrelation to Speece and Di Simone.

MR. PERSON: When they were saying that Nabcor could not get cars for resale it is construable and it may have been that they were talking about Nabcor cannot get cars on a fleet basis.

THE COURT: But you go ahead. You said it a little clearer. In other words, they are saying you can't get cars without a fleet certificate.

MR. PERSON: The dealers would not sell to us any automobile for resale. That is perfectly consistent with the idea --

THE COURT: That would be a black listing.

MR. PERSON: It could be either. They are saying that "We would see to it you won't get cars to resell." That is just stopping the fleet allotment. That is all it could refer to, either one.

THE COURT: Not if they are a company ordering one car.

MR. PERSON: A company reselling has to order more than one car.

THE COURT: There is no dispute.

MR. PERSON: When they are saying, for example, Nabcor has not qualified to buy cars --

THE COURT: Have you got any evidence as to the size of Rohrer? Was Rohrer a little dealer?

MR. PERSON: No, it was a major Chevrolet dealer.

THE COURT: Were they able to sell and deliver eight Chevrolets to Nabcor in November, 1967? Was that beyond their capacity? Was it a strain on them? Did they need a fleet allotment on that?

MR. PERSON: I would like to let the jury look at what Rohrer thought it had to do in running its own business. It originally indicated that these were fleet orders and wanted repayment, and if that is what they want --

THE COURT: What?

MR. PERSON: Repayment on the fleet allotment or taking from the fleet allotment because they marked it "Fleet." They originally marked this "Fleet."

THE COURT: There are just too many inferences available to permit a jury to speculate about that.

I am asking you, is there any indication that Rohrer had the slightest difficulty filling these orders for cars out of whatever it had? And they had the slightest need for a special fleet allotment for

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Nabcor? Any reason to believe that?

MR. PERSON: Only they indicated originally that they wanted the fleet allotment, checking the order as fleet.

THE COURT: Somebody testified to this.

MR. PERSON: Hilda Madden testified to this.

THE COURT: What did she say, they were short of cars?

MR. PERSON: I think there was shortages that developed at the beginning of every model year. That is the reason they would have checked fleet at that point.

THE COURT: Let's go on.

MR. PERSON: The discussion during this time revolved around the fleet certificate, that is with Di Simone, Speece and Anthony Maiorana,and Document No. 307 indicates that Di Simone and Speece left Anthony Maiorana with the understanding he will contact them as soon as he feels he has registered sufficient vehicles in the name of Nabcor to qualify for a General Motors fleet user certificate.

I think that indicates what Anthony Maiorana was stating about this whole conversation about the fleet certificate and getting cars is true. This thing backs that point up.

THE COURT: What exhibit is that?

MR. PERSON: 307, signed by Mr. Di Simone December 20, 1967, and that was an interesting date, because it occurs after the Belcher conversation. It isn't something that took place immediately.

THE COURT: Let me see that.

MR. KAPLAN: That document is not in evidence.

MR. PERSON: I thought it was.

THE COURT: It certainly is marked, marked 11/29.

MR. KAPLAN: That must have been in the last batch.

THE COURT: Is there any evidence, Mr. Person, that Nabcor could not qualify for a fleet certificate if it had in some way kept 10 or 20 cars registered in its name by some device and resold the others?

MR. PERSON: Yes. Mr. Rock had testified that he was unaware of any resellers who had a fleet certificate.

THE COURT: Let me pause. I always break these oral arguments up in about 10 different ways, but it is nearly 6, and I have to leave.

Now, we will resume on Monday, and I think the time is pretty well come when I have to rule on these remaining motions.

If you need a little time on Monday -- how much more do you think you will need, do you need any more?

MR. PERSON: I don't know, really, what to say or use for argument. I am willing to argue maybe 10 or 20 hours, but I can also cut it down to whatever you want.

THE COURT: Here is the thing, Mr. Person. You repeatedly stressed in your argument and you have developed this thought about the significance of the fleet certificate, the relation of that and the relation of other limitations to the allotment problem and so forth, the so-called white list problem.

You have in your argument integrated that with the other problem, the boycott problem, and you have discussed in the course of that a number of specific instances, and we have returned at times for further questions and so forth about the specific instances.

Now, I think at this point it is beginning to sound -- I don't want to say it is repetitious, it isn't repetitious, because I think that from my viewpoint for better or worse, as far as you are concerned, I certainly continue to understand better your argument and the application of the argument in specific cases.

Whether you and I agree on the result, at least it is a way to develop it in a way that means something to me.

But I think at this point we are beginning even in the last discussion when I asked you about -- I forget what it was --

MR. PERSON: Specific instances.

THE COURT: So I would like to know are there not other points you feel you have not covered?

MR. PERSON: Yes, your Honor. Basically, and I can summarize this very quickly how long it will take and what I will cover. What I would like to cover are the Belcher, Karney, Drury communications;

cover the Frank Maiorana, Speece and Di Simone communications and go over the dealer problems and some damages and probably maybe say keep it down to three hours or two and a half hours or less than that.

THE COURT: Haven't we covered that?

MR. PERSON: I have observations that differ from Mr. Kaplan's.

THE COURT: I don't care about Mr. Kaplan, I am talking about, haven't you covered those things?

MR. PERSON: I haven't covered Karney and I haven't covered Belcher's communications either, my own version.

THE COURT: Belcher communications with whom?

MR. PERSON: Frank Maiorana. We have admissions there and it mentions in other communications. I would like to be able to at least present them to you. I don't mean to monopolize your time.

THE COURT: No, you are not, but I think those are the things that are in the record. I know about those.

What I would suggest to you, I think you can assume that I have read and reread the material about those statements and I will do it again over the weekend.

I will rely on my own notes and they are very good, and I think I better hold the record.

MR. PERSON: I don't need it.

THE COURT: So I think you can pretty quickly run through your interpretation, but please don't feel compelled to tell me what the testimony was, those are the kind of things that I can keep in mind.

MR. PERSON: If you can say that the interpretations of Mr. Kaplan and Mr. Kleinbard are erroneous in their presentations in material respects --

THE COURT: No, I am not agreeing to that. I am just saying for your presentation you can save I think legitimately time and assume that I am familiar with the substance of that testimony.

MR.PERSON: I would prefer that.

THE COURT: And then if there are matters of interpretation, if you want to show their significance, in other words, just say "Okay, I assume you know what was in the record. Here's my interpretation. Here's what I think happened as a result," and so forth, I think that will save us time.

MR. PERSON: No more than two hours, as little as an hour, just to give you a rough estimate.

THE COURT: That's fair enough.

Again, the main thing is to just assume that I know the testimony and you give us interpretations, significant, results, whatever, and that will speed us along.

We are going to have the jury sitting in the jury room. Maybe we can have them take a walk, although it's probably not going to be the nicest day.

I think we have to have more argument. I'm not going to call the jury again and postpone it. They will have to sit it out a little bit.

MR. PERSON: Would a chart be helpful for the first 166 orders if I can put that together?

THE COURT: As long as the chart is correct.

See you all Monday.

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How about a 9 o'clock start? I will guarantee being here.

MR. KAPLAN: Perfect.

MR. PERSON: Perfect, your Honor.

(Adjourned at 6:00 p.m.)

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NATIONAL AUTO BROKERS CORP., et al.

vs. 70 Civ 5 421A

GENERAL MOTORS CORPORATION, et al.

December 6, 1976
9:15 a.m.

Trial resumed.

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MR. PERSON: I'll try to make this as quickly as possible.

THE COURT: I want to state for the record that in working over the materials about the brokers Saturday morning I found that the materian in Exhibit T8 did not seem to correspond in some cases with other information that I felt was established in the record. I have particular reference to instances where Exhibit T8 reflects no orders in the log for dealers such as Vandermar, Jones, Smith, and so forth, and the order log did in fact reflect some orders.

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I had my law clerk call Paul Weiss' office and request them to check that exhibit no later than Monday morning, and I have received a substitute exhibit.

I wonder if you could explain what has been done about that, Mr. Kleinbard?

MR. KLEINBARD: Basically, whathas happened, your Honor, is the originals that were given to you went from December 11, 1966 through December 10, 1970, the statutory period. We omitted therefrom anything that was barred by the statute of limitations. The new exhibit you have received covers the period from the inception of the log to December 11, 1966.

THE COURT: T8 is in evidence, right?

MR. KLEINBARD: Right.

THE COURT: I would suggest marking in evidence whatever you want to call it. T8 supplement?

MR. KLEINBARD: That's what it says.

THE COURT: That will be received on the basis just indicated. I think that's correct. The instances that I found were instances involving these Colonial Cadillac orders.

(Defendants' Exhibit T8 supplement was received in evidence)

MR. KLEINBARD: I have given Mr. Person a copy of that, your Honor.

THE COURT: Mr. Person, I think you can go ahead.

MR. PERSON: I would like to point out the date at which Nabcor received its last order from a variety of brokers during the '66-67 period. If it would be of any help I'll list it by broker code number together with the name of the broker and the last date on which Nabcor received the order.

64, Northeast Auto Brokers 12/7/66.

THE COURT: Pause on the first one.

Have you analyzed Northeast orders order by order?

MR. PERSON: I know what every broker has done but I don't have it with me. In terms of analyzing I would be able to state, in looking at my compilations, that there are several compilations that I have marked or have been introduced which give some assistance. I think one was 715.

THE COURT: Northeast was what number?

MR. PERSON: 64. For example, on 715, 64 appears as its fourth order, which was order No. 206 in the log. That was a delay.

Then we have the cancellation summary, which I'm trying to find at this moment which might have an entry --

THE COURT: In Mr. Maiorana's list of brokers which he said terminated at this time because of wrongful activities, he did not list Northeast.

What I'm getting at is this: I am telling you, anyway you analyze this case, it is an absolute sponge for time. If you want to analyze this case, division by division, you can do that. You can take it broker by broker. You could take sample brokers. You can take it for some time period and go across the board and analyze it for divisions, cars as a whole, and so forth. Whatever way you do it it is absolutely a tremendous job.

I know all of us have done some of this and nobody has undoubtedly done every conceivable method of analysis. I have done enough over the weekend, and prior to that on this claim of broker termination due to wrongdoing, to know that the only way to even get into that is to take each broker and each order, and beyond that a lot ofevidence which is not in this case, to know whether you could possibly attribute a broker's termination to General Motors' wrongdoing.

Northeast was one of the people that ordered Cadillacs, is that right?

(Continued on next page)

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MR. KLEINBARD: That is right, they ordered a Cadillac.

THE COURT: What else did they order?

MR. KLEINBARD: The log reflects no order to the dealer.

On the other two orders, the Chevrolet and the Pontiac, the log reflects delivery, and that is the sum total of the GM cars.

THE COURT: Say that again?

MR. KLEINBARD: Order No. 80, the Cadillac, indicates Nabcor received the order on August 31, 1966. The order log reflects no order to a dealer.

THE COURT: Not to Colonial or anybody?

MR. KLEINBARD: Not to anybody. It must be one of those two that reflects no order to the dealer. There were two that antedated the order to Colonial that were outside the statute of limitations. I think this is one of them.

In the log itself there is no order to the dealer. The next two cars that are General Motors cars are 148, which is a Chevrolet, the order received by Nabcor 10/14/66, and the order log reflects delivery of that car.

And the third car is 206, a Pontiac, order

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to Nabcor 11/23/66, and the log indicates delivered January 27, 1967.

THE COURT: When was the order placed?

MR. KLEINBARD: 11/23/66 with Nabcor. I don't know when it was placed with the broker.

THE COURT: Mr. Person says the last order received from that dealer was December 7, 1967.

MR. KLEINBARD: That is a Chrysler, in all probability.

Order No. 211 is a Chrysler, Nabcor received the order on December 5, 1966, and I suspect that is the one he is talking about.

THE COURT: Any result?

MR. KLEINBARD: The order log reflects cancellation.

THE COURT: That illustrates if we are going to talk about General Motors' responsibility or claim for General Motors' responsibility in having that dealer cease business, if it ceased business, then we would have to go into the specifics.

If Mr. Kleinbard's summary of the record is correct, then the last order you are talking about was an order to Chrysler if it was cancelled, and if that had something to do with quitting, with frustrating

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this broker, well, that isn't anything you can tag to General Motors.

It is useless to give me a lot of terminal dates. The first one you have given me is the order to Chrysler.

MR. PERSON: I don't think that Mr. Kleinbard really is suggesting that the nature of the last order is significant. The fact is if a broker stops giving orders at all, that is given significance.

THE COURT: The only significance is if there is evidence which could lead a trier of the fact to believe that General Motors was responsible, General Motors' wrongdoing was responsible for that termination.

I agree with you the last order is not magic, but you happened to mention the last order, and you did not attempt to describe the full chronology.

Which sheet is that, Mr. Kleinbard? Are you reading from a sheet?

MR. KLEINBARD: Yes, I am. These are sheets broker by broker. It is the sheets that were used to make up the supplement to Defendants' Exhibit T-8.

THE COURT: Let me see that sheet.

MR. KLEINBARD: The X with a circle is an error and that should be disregarded (handing to Court).

THE COURT: I just don't know what to say, except this is the kind of analysis you have to make. I did this -- I didn't have those sheets, unfortunately, so I went through, among other things, and made some kind of analysis of this.

I analyzed Vandermar, which is one of the things that Mr. Maiorana claimed was terminated in early 1967 by virtue of the activities of General Motors, and you can go on and on analyzing Vandermar alone.

I am not going to pause to do it, but I am just saying that you have to take the whole course of orders, you have to look at the cancellations or alleged cancellations, the deliveries, the so-called delays -- you claim there were some delays -- and see what evidence there is about delays and when they occurred and how they were related and so on and on and on.

These are intricate, and they are intricate because there is such a variety of pattern.

If there was any consistent pattern of either refusing to deal or long delays, I mean delays that you could even talk about, then it would not be so intricate.

The reason that it is intricate is because there is simply not a pattern that I have been able to discern that would indicate any pattern in a sense of either being prevented from getting cars or having long delays. That is why it is intricate, and that in itself means something.

All I am saying is, there is no utility in giving me a list of last orders unless you go way beyond that. The record has it.

MR. PERSON: I have 25 orders that relate to -- 25 brokers.

THE COURT: It is just misleading. If it is in the record, you can brief it later if it is a point.

MR. PERSON: I just want to make another couple of points about Mr. Rock's testimony. He said that the divisions furnished R.L. Polk statistics on the size of the fleet market furnished by the Fleet Section and that the division and dealers are encouraged to participate in the fleet market, page 3036, starting at line 2.

He went on to say the fleet allotments were set aside for the fleet market at 3038, and he said that orders marked "Fleet" are requests for an extra allotment, so that cars don'e come out of the dealer's retail allotment.

At 113, as we have identified it toward the end of Rock's testimony, Rock would not think of anyone other than a franchised dealer, qualified leasing companies, qualifiedusers or holders of fleet certificates as fleet purchasers for any purpose.

Berg said at page 349 --that must be missing a number here, the zone determined who got the fleet allotment. There was no policy or limit except to protect large national companies.

The intended reserve to go to a fleet purchaser, not to resellers, and the purpose is to handle orders which the dealer's retail allotment cannot handle.

If a company ordered 500 cars and was not qualified GM policy was that without the registrations the company could not get the fleet allotment.

Olson testified that where a Chevrolet dealer with an order for 200 cars during 1967 or 1968 could get the fleet allotment under GM policy was answered by the fleet plans for the year. That, of course, is reference to 10 or 20 cars registered in the name of the company seeking that allotment.

Murray, at page 1883 of the transcript, said that when a company is trying to buy cars from us they were expected to have a fleet certificae number that they had been okayed for fleet purchasers.

Your Honor indicated you are familiar with the testimony of the various people, so I am not going to dwell on the various admissions that I claim are there.

In terms of the Buffalo situation, Nabcor was very much involved in that because Dale Strimple testified General did not have a New York dealer's license at that time, so that the cars were being sought by General for Nabcor during the period in which the refusals were taking place.

The theory of damages, Frank Maiorana testified a broker was worth $3000 per year, and therefore the extent to which the brokers that Nabcor had which did not meet that standard would be the method by which the jury could find injury, and that would be taking into account, subtracting the number of cars that the broker actually did sell from the amount they should have sold.

Then the substantial number of brokers sold in the first year is the standard by which the other years could be measured, so that additional brokers would have resulted in additional sales for Nabcor from the standpoint of the loss of value of business, there was an offer amounting to the valuation of the business at 750,000, I think that is evidence the jury could use, contemporaneous evidence relating to the value of the business.

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THE COURT: Are you still claiming that these defendants are liable for the value of the business?

MR. PERSON: On alternative theories, yes. And also there is an alternative, the loss of income that we can establish for the four-year period.

THE COURT: Have you made any modification of your claims?

MR. PERSON: I reduced --

THE COURT: What are your current damage claims? I would like to know if they have been modified from the discussion we had that weekend or what.

MR. PERSON: The claim is of loss of income. One claim is destruction of business. That's a claim made with respect to all the plaintiffs. That applies to General and Nabcor.

THE COURT: You are claiming that General Motors should be liable for what you say is the destruction of the business of the plaintiffs, right?

MR. PERSON: Correct.

THE COURT: You apply that to Nabcor, to General, and you would obviously apply it to the other plaintiffs that I have dismissed?

MR. PERSON : Yes.

THE COURT: What is the theory on which you could recover the destruction of Nabcor's business?

MR. PERSON: The interference by GM with Nabcor's method of doing business which caused the business to get into a position where they didn't have the capital to continue the business the way they were going.

THE COURT: Not generalities. When did this occur?

MR. PERSON: It occurred in '67 as a result of activities of late '66, early '67. This is the point at which Nabcor had to eliminate a very substantial portion of its work force and wound up with cash of a very small amount compared with the expenses they had had the preceding year taken from the financial statements; the cash expenditures for the year were $150,000 or something like that and they had a relatively small portion of that in the bank in cash, and at that point they retrenched because of the activities they were facing and they never recovered from those activities, and it caused the destruction of the business.

THE COURT: Have you analyzed the financial

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statements?

Do you claim they would have sold any more franchises in 1966 than they did in -- I think you said a minute ago that 1966 should set the standard for the franchise sales?

MR. PERSON: The minimum.

THE COURT: Would you argue to the jury that Nabcor would have sold X number of more franchises in 1966 had it not been for the activities of General Motors?

MR. PERSON: Equal to and beyond the amount sold in the year '66.

THE COURT: I'm talking about '66.

Would you argue before the jury and are you arguing before me now that but for the activities of General Motors Nabcor would have sold more franchises than it did in 1966?

MR. PERSON: What I'm arguing is yes, that '66 was a partial year for Nabcor. So actually they would have, on a projected basis, sold more than the dollar amount than the number that was sold in '66 because it was not a full year. Also there was a growth rate --

THE COURT: Do you claim that the activities of General Motors frustrated any sales in 1966?

MR. PERSON: In '66, it's difficult, possibly, to be able to isolate the activities specifically in that year so that by taking '66 as a whole, we can use that as a standard even without the assumption that there was any interference which, of course, there was during the year. But I think that '66 is a useful year to use.

THE COURT: I didn't ask you whether it was a benchmark. I ask you whether you claim there was any frustration of sales in 1966?

MR. PERSON: The activities that occurred during 1966 should be taken into account by the jury when determining what happened and that would be --

THE COURT: Let's pass. You are not answering the question.

MR. PERSON: I would say yes, and I have not been able to put a dollar amount on that.

THE COURT: Let's take it for what it was. Nabcor sold some 50 franchises in 1966 and it has been conceded that Nabcor got from those sales at least 230,000, approximately, of cash and notes, and I think it was conceded this was probably 150,000 cash and 80,000 in notes. These are somewhat rough figures but certainly ballpark figures. That's the way they ended up the year.

They also, through a really quite remarkable accounting method, avoided paying any income taxes. As far as I can see, there is no record that they paid any income tax.

MR. PERSON: They also spent the money.

THE COURT: Most people pay taxes.

MR. PERSON: You pay it on net incomes after expenses and they expended money.

THE COURT: They didn't include the notes in the gross income.

MR. PERSON: They didn't include the notes, but they did spend the money.

THE COURT: They were much better off at the end of that fiscal year, the year ending January 31, 1967, than a lot of people who had been taking in $150,000 cash and would have had to pay corporate income taxes. They managed to avoid that.

If course they had expenses. Everybody has expenses.

MR. PERSON: They used their cash for that expense so they would not pay a tax on that cash. They expended the money. It's on page 4.

THE COURT: Did they pay any taxes?

MR. PERSON: I see some reference to taxes of a minimal amount. It was probably payable 13,000 for payroll. Payroll would not be a tax.

I don't see where there is any income tax that was paid, and I see a deficit of $124,000 for the company.

THE COURT: What you are saying is that even if they had declared that, all that franchise income as gross income, it would have been eaten up by expenses?

MR. PERSON: Not the notes. The cash was.

THE COURT: Suppose instead of franchise income of $1500 they had declared $240,000?

MR. PERSON: There would have been a tax to pay on the notes, just on the notes. The cash at the end of the year is approximately the capital contribution. The cash expenditures in excess of that --

THE COURT: You don't pay tax on notes, you pay tax on income. If you use income you owe tax. If they had decleared the 235,000 or whatever, it must have been a little more, but if they had declared that as franchise income, they would have had a net profit for the year of --

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MR. PERSON: 106.

THE COURT: Wait a minute. If I can read this right, they had a net loss of 126,000 for the year. They recorded that. If you add to that $240,000 --

MR. PERSON: 234, your Honor. That's the figure we are dealing with, to be specific.

THE COURT: Let's call it 236 so the addition is easier. We really don't know exactly.

That would have given about $110,000 net income, if I am correct. Out of that they would have had to pay corporate taxes of $55,000. They avoided this so they were quite better off than they would have been had they not had that nice accounting device.

MR. PERSON: The first 25,000 in income would have been taxes at a much lower rate, number one.

THE COURT: But they would have had to pay some tax and they might have owed it in cash and they avoided that. So their cash situation was really remarkably good, it seems to me.

MR. PERSON: Only because of these notes. The cash was spent so that the cash situation was not any better than what is depicted here in the financial statements, which is that they spent it.

THE COURT: They would have owed taxes. You can't tell the Internal Revenue Service "My income consisted of notes and I don't owe you any money." The Internal Revenue would say "Raise the money."

Let's not argue.

I am very skeptical about the claim that the business was destroyed because of this situation in late '66 and early '67. I think it would take a careful analysis of the financial statements as a whole to justify that kind of thing.

MR. PERSON: We maintain and I think it's a very strong claim that the business was interfered with and the business was destroyed by the activities that we have put into evidence.

In addition to that the interference itself, the total destruction involves the loss of certain elements of income to Nabcor.

THE COURT: How do you figure those?

MR. PERSON: Using '66 as a standard so that the number of brokers in the forthcoming years, the difference in the brokers -- that is, that in the first year there were 50 brokers and there should have been 50 more for each year we were active and producing at the rate which would give Nabcor income of $3000 a year per broker, so whatever income Nabcor has short of that would be the measure of damages relating to --

THE COURT: Say that again.

MR. PERSON: That Nabcor in its first year had a certain number of brokers, 51 or 52.

THE COURT: I think it was 51.

MR. PERSON: That's the minimum number per year that Nabcor should have had, and it also allows additional brokers to be considered that Nabcor lost in the following years because '66 was not a complete year for every Nabcor.

THE COURT: It does not make any difference, but I think your list, X5, has 52 brokers for '66. Let's say that for the purpose of discussion. It does not make a lot of difference.

Those were all straight brokers.

In 1967 they started the master broker concept and my figures show -- this is from Exhibit X5, or something like that -- there are differences in different tabulations but they're minute. I have four master brokerages sold and 36 regular brokerages.

MR. KLEINBARD: That'S right, your Honor.

THE COURT: In the tabulations that have

been put into evidence -- I asked this before -- were there other brokerages somehow sold by the master brokers or the area brokers that are not included in these lists?

MR. PERSON: There probably were. It's hard to identify it. It's one of those unknown variables we have here. It does not appear to have been too substantial, but I really don't have much evidence to go on this. It's the lack of any substantial appearance of their names or numbers. It may be that the A1, A2 designations in the log refer to sub-brokers of masters or area brokers.

THE COURT: Shall I take it that the list here that we have -- there are two lists that are virtually identical, X5 and a plaintiffs' exhibit. Those lists include brokerages sold by Nabcor rather than brokerages sold by area brokers or master brokers, and that there may have been other brokerages sold by the masters or the area brokers but there is no evidence, andyou don't contend they're substantial; is that a fair statement?

MR. PERSON: With the exception of sales made by Turco that had some involvement with Nabcor and others that did not, I would say that's a fair summary, except for a little bit of Turco franchise selling.

THE COURT: In that list?

MR. PERSON: That's correct. I don't know if they appear inthe list. I don't know if they appear in the defendants' version; these few brokers sold by Turco without Nabcor's help appear. They were guided by having a franchise and I'm not sure that we have a copy.

THE COURT: So the list may include some brokers that were sold by Turco?

MR. PERSON: Probably up to five or six, something like that, at the most.

Does that sound correct to you or not?

MR. KAPLAN: I really don't know.

THE COURT: That's sufficient. I get the point.

Go ahead with your analysis.

You would say in 1967 you could have assumed at least 52 brokerages sold?

MR. PERSON: Yes. Without the change. The change in Nabcor's brokerage system was caused by the activities we complained about, so taking their brokerage structure, the way it was, there would have been so many more brokers each year, active brokers, and the minimum would have been 52 times each of the years in question, five times 52, approximately, plus any protion of '66 that can be projected because it's a partial year, plus any greater growth during '66 itseld which could be projected further.

THE COURT: When you say five times 52 what do you mean?

MR. PERSON: '66 is a year in which brokerages were sold and it's not a period for damages but a four-year period would give you 52 times 4, but you have to pick up those brokerages sold in '66. So approximately five times 50, with certain projections built in, would give you the number of brokers for that whole period that should have been active.

THE COURT: How many?

MR. PERSON: In terms of having met the full amount, very few. "Activity" is a term that's difficult to define.

THE COURT: I thought we were talking about brokerage sales. You can assume at least the evidence would permit an inference that Nabcor would have sold 50 brokerages a year if it had gone along a normal course.

MR. PERSON: Or more.

THE COURT: At least 50.

As to brokerage sales, you would think that you were entitled to the difference between that number of sales, 50 per year, and what was actually sold in the way of brokerage sales.

MR. PERSON: For the years of damage period, yes. So when I was referring to the fifth year I was talking about car sales and not brokerage sales. Brokerage sales would have four years of that 50 or more brokers to talk about.

THE COURT: Get into car sales now.

MR. PERSON: That every broker, we claim, would have produced on the average of $3000 in income to Nabcor, $50 a car, times 60 cars. That's $3000 per broker per year.

THE COURT: You figure the 3000 --

MR. PERSON: 60 cars times $50 per car, Nabcor's portion.

THE COURT: What does that give? Have you calculated that?

MR. PERSON: At 250 brokers in the first year of the damage period there would have been 100 brokers times $3000. That would be $300,000 in the first year of the damage period minus the sales, minus Nabcor's own gross profit from car sales.

In the second year there would be an added $150,000 bringing it up to 450.

In the third year --

THE COURT: Wait a minute. 150 times 3000 in 1968?

MR. PERSON: It goes up by 150.

THE COURT: And 1969 you would say 200 brokers, right? So you would claim loss of car sales, loss of gross profit, for '67, 300,000; '68, 450,000; '69, 600,000; 1970, 750,000 -- or 21,100,000, correct?

MR. PERSON: That's right.

THE COURT: That's Nabcor loss gross profit on car sales, and you would have to figure something for overhead.

MR. PERSON: That was guilt in, but minus the gross profit on car sales for hte fiscal years '68, '69, '70 --

THE COURT: What is that?

MR. PERSON: It's not much. It's the number of cars they sold times $50.

THE COURT: Not much? Gross profit -- I

see. Gross profit on automobiles, yes. That's very small. It may be a total --

MR. PERSON: Roughly 35 to $40,000.

THE COURT: I understand.

Are there any other damage claims you want to give me the breakdown on?

(Continued on next page)

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MR. PERSON: Well, the several hundred thousand dollars, $200,000 of promissory notes that were written off or became worthless. I am just trying to think if that goes into the interference rather than total destruction of the business.

It really represents the loss of brokers for all those years that made sales, so it is probably includable at least in this second type of damages, the interference, as distinguished from the total destruction, and I think in terms of total destruction it should be taken into account.

I think it should be considered with the value of the business as elements that have gone into the business subsequent to the time that the valuation was made of the business.

THE COURT: Going back to the brokerage sales, if you sold 50 brokerages a year for $5000 each, and that doesn't take into account yet master brokerages or area brokerages --

MR. PERSON: They weren't inthat time frame. That was only a development that was done after the course of the activities.

THE COURT: Your claim is really for 50 straight brokers?

MR. PERSON: Yes.

THE COURT: That is $250,000 a year?

MR. PERSON: Subtract from that the amount sold in order to --

THE COURT: How do I get that? This is a question because your offering circular has franchise income for 1968 of $127,000 and then for 1969, $168,000, and 1970, $183,000.

If the write-up in the offering circular represents the taking into income of franchise sales when made, then it follows that is what it represents and your subtraction would be of those amounts.

MR. PERSON: In adding back the amounts that were written off so there was a certain balancing in that.

THE COURT: I don't know what it means. What would you subtract?

Look, Mr. Person, let's suppose the jury were to find that you should have sold 50 brokerages in the year 1969. Now, that is $250,000. We worry then, and you say you have to subtract what Nabcor did make?

MR. PERSON: I think that for these four years in question that you deduct the amount from 250 for each of the four years, January 31, 1968, which represents 1967, and for each of the following three years in the offering circular financial statements, that you would subtract that amount from the $250,000.

THE COURT: In other words, allowing for the difference of a month in the fiscal year --

MR. PERSON: Forgetting that for just the minute.

THE COURT: Subtract the amount labeled franchise income in the circular.

MR. PERSON: Taking the worst as to Nabcor because of the lack of any other figures, that you would deduct those amounts from 250 or higher, whichever was the higher amount for the years, as sales should have been, and deduct that from what the sales were.

THE COURT: We have to use the franchise income in the offering circular.

MR. PERSON: Correct, and add back the 200,000 write-off.

THE COURT: All right, I understand.

Now, we have your elements, you started with the list, lost element of income to Nabcor. You have the lost franchise sales and you have the losses in respect of car sales and mentioned the $200,000 promissory notes written off, and we won't worry about whether that should be included in the category of destruction of business or loss of income. I get your point.

What other items of damage?

MR. PERSON: The specific car transactions that we have discussed at length throughout the preceding weeks. These are subsumed to the others, sub-categories of damage which I am trying to take in sort of descending order so that if we don't have the higher amounts of the specific cars that were entered into as our claims, the cost, the time involved to Nabcor, the out-of-pocket expense for salaries and matters that related to the different refusals to deal, should be evaluated by the jury in terms of the amount of time that Nabcor had to put in to correct these problems, take the allocable salaries of the personnel.

Also the liability of Nabcor, the contigent liability to all of the franchisees under the breach of contract theory, adding up to the total amount of franchise sales for the whole period.

THE COURT: Anything else about Nabcor's damages?

MR. PERSON: No, your Honor.

THE COURT: On the destruction of business, if the jury went for that theory, you mentioned it and it slipped by me, what value would you --

MR. PERSON: $750,000 as adjusted by the sales of the franchises. There is some value that could be assigned to the subsequent success of Nabcor after the evaluation date.

THE COURT: Will you argue you could get -- you would argue Nabcor was worth 750 at what point?

MR. PERSON: Roughly, March or April of 1966, the time of Earl Stewart, mid-1966.

THE COURT: Would you believe that you could get both the 750. thevalue of the business, and you could also get the other lost items of income, both of them?

MR. PERSON: No, the higher of the two. You can't have both damages, but whichever one would give the higher amount.

THE COURT: I understand. I think I have the picture on Nabcor, unless you have other items you want to include on Nabcor.

MR. PERSON: No.

THE COURT: Let's go to Frank Maiorana and Anthony Maiorana. Have you looked at the cases about their standing?

MR. PERSON: I have read a couple of these cases, and it seems that the case law suggests, at least what I have read, that the shareholders per se are not within the protection that is provided by the Clayton Act.

I don't take that as dispositive, but I think it could go either way ultimately, but at least at this time it doesn't look as favorable for them.

THE COURT: That is a fair statement.

MR. PERSON: But their property was affected, that is the interest they had in the company, but that was a property interest that was affected under that statute, so I think there is a legal argument they are entitled particularly because much of the activity was directed against Frank and Anthony themselves.

They played a prominent part in anything relating to Nabcor, they were very prominent as the people who owned it, and the jury could construe the activities were directed against them as well.

THE COURT: The items, are they the same? You have two items for Frank and Anthony listed that you gave us as the time of the discussion.

MR. PERSON: It was a dissolution of their stock interest on the one hand.

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THE COURT: Did you figure the amount?

MR. PERSON: They would be entitled to 40 per cent -- that is, if they suffered a reduction of percentage of their ownership in Nabcor as a result of this offering.

THE COURT: All right.

MR. PERSON: The result was each one suffered the 40 per cent dilution and there are figures in the offering circular which show the effect on all of Nabcor, something like 13 per cent for Anthony -- I would have to go back.

THE COURT: The theory is the dillution of their interest because of the compulsion to sell.

MR. PERSON: Correct, your Honor. And a loss of salaries that they would have enjoyed had they had Nabcor operating as it had been planned to operate and they claim would have operated.

A standard of that in the case of Frank Maiorana, he was worth substantially more than what he was getting from Nabcor, and the same thing is true of Anthony Maiorana.

THE COURT: Now, I have dismissed Young and the Estate of Jamele. How about General? What are General's claims?

MR. PERSON: General's claims are a destruction of business as well as a loss of sales and franchise income.

THE COURT: How did you figure that?

MR. PERSON: General had a master franchise and at a minimum would be entitled to the full 100 brokers that would have been under them. He actually had more than that, but at a minimum he is entitled to --

THE COURT: He may be entitled to go out and try to sell, but would you ask the jury that he could have sold 100 brokerages?

MR. PERSON: Yes, your Honor. I would claim that, because beyond that we get into something that has --

THE COURT: He would have made what?

MR. PERSON: The loss of sales would have been calculated the same way as Nabcor.

THE COURT: 100 times 5000?

MR. PERSON: For 100 brokers at 60 cars --

THE COURT: No, you would start out by saying he lost the income from selling the brokerates.

MR. PERSON: Correct.

THE COURT: He would have basically 100 times 5000?

MR. PERSON: Yes. Let me use that as a starting point and --

THE COURT: How about the loss of auto income?

MR. PERSON: Calculated by the number of brokers during the period of Nabcor, which is some time early or mid-1967, through the end of the damage period; three and a half-years, approximately.

THE COURT: Three and a half years, and how would you calculate it?

MR. PERSON: By taking a half-year's brokers and with 100 brokers, there would have been in the final year, it would have been 6000 cars.

THE COURT: What is the first half-year? That would be the last half of what?

MR. PERSON: Of 1967.

THE COURT: All right, the last half of 1967, and how many brokers would he have had? He wouldn't have had 100 brokers.

MR. PERSON: We are willing to proportionate it. Working back, 100, 75, 25, 12-1/2 brokers.

THE COURT: Starting in 1970, is that right?

MR. PERSON: Right.

THE COURT: Then he would have had 100 brokers selling at a full rate.

MR. PERSON: You would have it on a proportionate basis. By that time he would have had his 100 brokers, and if you move it back --

THE COURT: Let's start with 1970,that is the last year. Let us assume he had his whole 100 brokers, and what is he going to make out of each broker each year?

MR. PERSON: Half of Nabcor, 1500.

THE COURT: That is 150,000, right? Let's go back to 1969. How many brokers would he have had on then?

MR. PERSON: 75.

THE COURT: Multiply 15 by 1500 --

MR. KAPLAN: 112,500.

THE COURT: 1968, what would you say, 50 brokers?

MR. PERSON: Yes, your Honor, I guess 75.

THE COURT: The last half of 1967?

MR. PERSON: Half of that amount, effectively 12-1/2.

THE COURT: How many brokers would he have had on, do you claim?

MR. PERSON: During that time I am trying to pro rate everything, just half of the remaining, just to come up with a figure. In other words, throughout the whole period --

THE COURT: I don't know what you can do. The last-half of 1967, starting up, and it was only a half-year --

MR. PERSON: It may be easier to take a third and a third and a third for the remaining three years.

THE COURT: We started with 1970, we got then 1969 and 1968, and the last-half of 1967 was just starting up.

MR. PERSON: Half of 25 would be 12-1/2.

THE COURT: Let's say 12 brokers he could have put on in the last half of 1967.

MR. PERSON: Easily.

THE COURT: And then he hasn't got a full year, so instead of 1500 would you take 750 per broker?

MR. PERSON: Correct.

THE COURT: All right. What is that?

MR. KAPLAN: 9000.

2 THE COURT: Any other losses to General?

MR. PERSON: The loss of franchise sales, we covered that.

THE COURT: Can somebody total up those

figures?

MR. KAPLAN: 355,500.

THE COURT: Let's to to Turco. We didn't talk about Turco that night. What at the claims as to Turco?

MR. PERSON: From the standpoint, going back to General, from the standpoint of destruction of businesss, also the minimum amount of capital contribution that would be the alternative valuation. With Turco the thing would be the same basis of calculation as it was with General.

THE COURT: You would assume loss of franchise sales and loss of auto sales in a comparable way.

MR. PERSON: Taking into account what he did.

THE COURT: Let's not pause for the figure. We have the sample.

Do you have anything else you want to present?

The figure, the total for that General is 346,500 instead of 355,500.

Is Turco individually a plaintiff?

MR. PERSON: No.

THE COURT: Just Nabcor East?

MR. PERSON: Correct, your Honor.

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THE COURT: What is the name of the association?

MR. PERSON: Niagara Frontier Automobile Dealers Association.

THE COURT: Formerly known as what?

MR. PERSON: Buffalo Automobile Dealers Association.

Your Honor, Document 85, I don't want to go through all these documents if they are referred to in the record in any event for whatever I saw important at the time, but this Document 85 is 12/14/66, and it is a reference to Nabcor and states in their brochure they state they are holders of a fleet user certificate for all car manufacturers and are able to supply these cars because of this.

They also mention since the decision of the LA. Court, they can do this without any legal entanglements. The dealers are quite upset about this, and this was brought to Mr. Church's attention. He was an Oldsmobile Division, a Regional Manager, and I skipped a few things, and also says Nelson Karney will advise.

THE COURT: Can I see that, please?

(Handed to Court.)

MR. PERSON: Bob Berg and Nelson Karney were

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in communication with each other on December 15, 1966, and Walter Gray and Nelson Karney on 12/21/66, a reference to our friends on the 5th floor. That is Exhibit 82.

THE COURT: May I see that.

How does this connect up with what? You have these things in December, 1966.

MR. PERSON: Walter Gray was already knowledgeable about Nabcor before he even came in.

THE COURT: Before he came in where?

MR. PERSON: Before he was the one, at the time he was --

THE COURT: Walter Gray, about this time talked to Frank Maiorana about a fleet certificate, and there was no fleet certificate.

MR. PERSON: That is correct.

THE COURT: But I want to make sure I have this, the correspondence involving Berg and Karney and Olson came about a year later, did it not?

MR. PERSON: There were prior communications between Karney and Berg in December, 1966, concerning Nabcor.

THE COURT: Give me those.

MR. PERSON: Exhibits 80, 81, 84 and 313

(handing to Court).

THE COURT: Karney was in the Fleet Section of General Motors, right?

MR. PERSON: Correct.

THE COURT: Berg was in the Fleet Section out in Detroit, wasn't he?

MR. PERSON: Correct, your Honor.

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THE COURT: What do you argue was the purport of these documents in late '66?

MR. PERSON: In late '66, your Honor, it was known to GM that Nabcor was very competitive with the GM dealers and the dealers were upset. It was also evident that Nabcor was seeking to rely upon the ability to buy cars as a company using a fleet certificate. There is no statement anywhere that this was wrong, that Nabcor was taking the wrong approach.

The letter about Nabcor's claiming it's a fleet certificate user, that doesn't say that Nabcor is wrong. It seems to claim that Nabcor says it's legal since the LA decision, which brings me to the point that the whole fleet allotment and fleet certificate program of General Motors is a violation of that decree which prohibits GM from interfering perpetually with discount selling of Chevrolets, nationwide.

THE COURT: Do you have anything else?

MR. PERSON: No, your Honor.

THE COURT: Any further remarks by any lawyers?

MR. KAPLAN: Unless you have any specific

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questions, no.

THE COURT: No, I don't.

I think we'll take a recess.

I need to sit here a few minutes to organize the papers I have. Excuse me to do that.

Then we'll be convened.

(Recess)

(Jury in box)

THE COURT: Ladies and gentlemen, you undoubtedly are wondering what we have been doing here in your absence. We all very much appreciate your patience at this time as well as your patience throughout the trial.

What has happened is that, as you recall, the plaintiffs rested their case last week, and at that time the defendants had the right to make motions to dismiss the case because of alleged insufficiency of the plaintiffs' evidence.

The rule is that at the end of the plaintiffs' case the Court, upon motion, may assess the evidence put in by the plaintiffs and if there is enough evidence to create questions for the jury under which a reasonable juror could find for the plaintiffs, then the defendants have to put on their defense. Then, presumably at a later point, the case goes to the jury, unless the defense is so conclusively destructive to the plaintiffs' case.

But the point is, in a trial, after the plaintiffs have rested, the Court, upon motion, will assess the evidence to see if there is enough evidence to go forward.

This has been a long trial -- not the longest on record by any means, but it has been a lot of work and it's been a fairly long proceeding.

In addition to the testimony received there has been received a great body of very important documentary materials, statistical materials, about car sales and so forth, and all of that had to be gone over very carefully by the lawyers and by me to see, really, whether under the rules of law, the case should go forward or not; had the plaintiffs presented enough proof in their case to warrant the trial going forward or hadn't they?

It took, as I said, a great deal of time by the lawyers and by me in hearing and going through and trying to analyze all of these different matters, particularly the statistical matters which were quite complex.

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But one cannot really deal with this case in broad brush fashion, in terms of generalities. One has to get into details, the minutiae, otherwise it can't be handled.

I have decided, and I'm going to put a more formal statement on the record, as follows:

I have already, in the course of the argument, dismissed certain claims of certain plaintiffs, and I am now prepared to dismiss the entire case on motion, and I want to say that I will put a rather lengthy statement on the record. You are welcome to sit and hear this if you would like to do so. I think that the Court owes the jury an explanation in detail as to why it has sat here and given such a lot of time and effort and patience to this case, and then why the jury will not be permitted to go foward and decide the case.

I don't know how you feel, but it would be somewhat understandable if you felt a bit frustrated, but all I can say to you is that there was no way by which this case could be disposed of without going to trial.

If we all had it to do over again perhaps at some early stage in the case there could have been

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certain issues brought out in pretrial and the case could have been disposed of, but I don't really think so. I think the case had to go to trial and that meant that a jury had to be impaneled and you had to hear what the evidence was. That took a lot of work and a lot of time.

But still, if the evidence is not sufficient to really permit you to find conspiracy under any view of the evidence, it would be unfair to let the case go to you, because you would, in effect, be in the position of speculating, and I think I can explain why this is so in my statement, which I intend to make, a rather lengthy one.

It would also be unfair to make the defendants put on their evidence if there was not really a case which required a defense. If there is nothing, basically, to defend against, then there is no particular reason for a lot of days and weeks of defense proof. It is not useful.

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So that in a rather crude, hurried way I am trying to explain to you, first of all, my very deep gratitude for all your patience and your work and your attention.

The second is that in my view the plaintiffs failed to make out a case which would possibly be justified for even consideration by the jury, and I will proceed to put my decision on the record and my reasons on the record, and you are welcome if you wish to stay and listen to this. I think it might be of interest to you, it is a matter of public record, so there is no longer any confidentiality to this.

While we were having our discussions, obviously you couldn't know what that was. Now, there is a great deal that could be said and one could go on for hours in discussing the statistics, the evidence and so forth, and I will try not to do that.

But I will try, as best I can, to summarize the reasons why I think that, under the applicable legal standards, there is an insufficient case to require a defense or to go to a jury.

As I said, I will proceed now to put my statement on the record, and in a more formal manner.

As the record shows, all the defendants have moved at the conclusion of the plaintiffs' case to dismiss all of the remaining counts and claims of the plaintiffs against the defendants.

Certain motions were granted by me during the course of our discussion, and I believe that the motions that are still left for decision are as follows:

There is a motion to dismiss the central claim in the case, that is, Count 1 of the complaint under Section 1 of the Sherman Act. The remaining parties to Count 1 are Nabcor, General Auto Sales & Leasing, Nabcor of East New York, Frank Maiorana and Anthony Maiorana (the principals of Nabcor), and Dale Strimple (a principal of General), as the plaintiffs.

The remaining defendants to Count 1 are General Motors, General Motors Acceptance Corporation, Paul Batt Buick Company, Campbell Chevrolet, Bob Bain Chevrolet, Gillogly Chevrolet and the Niagara Frontier Automobile Dealers Association, formerly known as Buffalo Automobile Dealers Association.

There is also still in the action Count 3, which basically involves a charge that Section 1 of the Sherman Act was violated in the District of Columbia. This is a special statute which provides for liability in the District of Columbia and Count 3 alleges a violation of that statute.

Then there is a small part of Count 17 to be dealt with, which I will come to later.

As you know, Count 1 charges violation of Section 1 of the Sherman Act and alleges basically that there was a combination or conspiracy among General Motors, General Motors Acceptance Corporation and certain General Motors franchised dealers designed to prevent Nabcor and its affiliates from obtaining automobiles. This is a so-called Black List theory which has been referred to as such by the plaintiffs' attorney.

The description or the allegations in the complaint are very lengthy, but I might mention a few of them. There is the allegation that General Motors and the other alleged co-conspirators, including General Motors dealers, conspired so that General Motors coerced and convinced franchised dealers or certain franchised dealers not to continue supplying new automobiles to Nabcor.

It is alleged that General Motors conspired with certain dealers to assist in eliminating Nabcor and its franchisees as competitors. It is alleged that General Motors conspired to coerce and convince the dealers who were dealing with Nabcor to discontinue their dealing under threats of loss of franchise and so forth.

Now, there is another allegation which Mr. Person on behalf of the plaintiffs has referred to as the so-called White List theory. Nabcor alleges that it wished to purchase cars in quantity on what Nabcor called a fleet basis.

It is alleged that General Motors under certain circumstances made fleet allotments available to its dealers to provide quantities of cars for those dealers to sell to certain fleet customers.

Nabcor alleges that this type of allotment was not available for dealers in order to provide them with cars to sell to Nabcor, thus preventing Nabcor from obtaining cars which it should have been able to obtain.

The standard which I am to apply in dealing with these motions to dismiss are as follows. I refer to a case, Epic Producing Corporation v. Killiam Shows, Inc., 522 Fed. 2nd at 737. This is a case decided by the Second Circuit Court of Appeals, which has held that in order to grant a motion to dismiss, the evidence must be such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict.

If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, then the granting of the motion is proper.

On the other hand, if there is substantial evidence opposed to the motion, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the case should be submitted to the jury and the motion to dismiss or for a direct verdict should not be granted.

There has to be something beyond a mere tidbit or scintilla of evidence in order to get the case to the jury. That is the standard which I am seeking to apply. I am ruling that under this standard all remaining claims must be dismissed.

After an exhaustive review of the evidence, I have concluded that there is no evidence upon which the jury could reasonably decide that there was a conspiracy or combination of General Motors with its dealers or any of them to boycott or to deprive Nabcor of automobiles. In other words, there is no evidence upon which the jury could reasonably conclude in favor or uphold the so-called Black List theory.

Let me go on to the so-called White List theory. I have concluded that as a matter of law General Motors has the right to make fleet allotments available to dealers for potential sales to fleet customers other than Nabcor and has the right not to make such allotments available for potential sales to Nabcor. However, I am holding further that there is no evidence whatever that any specific orders of Nabcor were ever denied because of any fleet allotment problems.

I have concluded that the legal question about the right of General Motors to make fleet allotments in the way it did, and when I say the way it did, I am assuming the situation most favorable to plaintiffs here, I am only saying that that question is academic as far as this case is concerned, because there is absolutely no evidence that Nabcor failed to obtain any cars in any specific transactions because of problems of allotment.

In other words, there was a lot of discussion about the fleet allotment, fleet certificates in a very theoretical manner, but when it came to evidence about the allotment problem which prevented Nabcor from getting any cars, I don't find any such evidence at all.

I would like to mention briefly the matter of the time period covered by the action. The complaint was filed and an action commenced December 10, 1970. There is a four-year statute of limitations which means that the time period covered by any claims could go back to December 10, 1966, but no further.

There was no supplementary complaint filed alleging any misconduct after the date of the complaint, that is, after December 10, 1970. Therefore, the net of it is that the time period we are speaking of in connection with this action is December 10, 1966, to December 10, 1970.

Of course, evidence by way of background was introduced about events occurring before December 10, 1966. There was some evidence to some extent about such events and there was a little bit of evidence about events occurring after December 10, 1970, again by way of providing some follow-up in the way of narrative.

But the basic time period we are talking about is December 10, 1966, to December 10, 1970. I should also note that the original case involved a host of other defendants besides the ones you heard about in court. Ford Motor Company, Chrysler, American

Motors, a number of banks, newspapers, Better Business Associations, and so forth. In order to attempt to get the trial handled efficiently, we severed the issues as to General Motors and its dealers, and the one trade association, and that is what we are dealing with at this trial. Other phases of the case remain to be decided.

As far as Nabcor's business is concerned, it started in 1966 and lasted, according to the evidence, until the Spring of 1973, although we really don't know much about what happened after December, 1970.

As you know, the business of Nabcor was initially to sell what were called brokerages and the concept was that Nabcor's brokers located in different localities, would operate with little or no overhead, they would operate without the showroom of a regular automobile dealer, that is, a regular General Motors or Ford or Chrysler dealer.

These brokers would operate perhaps out of their filling station, they might operate out of their home or out of a little low-cost office, something like that.

These brokers would, as I have said, not have a showroom, not have an inventory of cars to show or demonstrate, and they would not have an inventory of spare parts and they would not have repair facilities.

They would offer to sell cars of all makes and models. They would not be limited to General Motors or Ford or Chrysler.

Furthermore, the idea was they could offer these cars at a much lower price than the usual retail price of a dealer.

Nabcor's place was to head the system in a kind of administrative fashion and its most important function, in addition to selling these franchises, was to procure the cars.

In 1967 and 1968 two tiers or additional tiers of brokers were conceived of. In 1967 you had the concept of the master broker, and the master broker would be a kind of intermediary between Nabcor and the regular brokers. The master broker would sell brokerages. The master broker at least in theory was supposed to develop its own sources of supply for automobiles so that the brokers could order cars from the master broker and the master broker would get cars.

If I haven't said it already, originally Nabcor was to get the cars and when the master brokers came in, the master brokers were also to help get cars.

There was also in 1968 introduced a concept of an area broker, an echelon between the master brokers and the regular brokers.

In general, at least in the first stages, the regular broker paid $5000 for his franchise. He might pay cash, he might pay notes or he might pay a combination of cash and notes.

The master brokers apparently would pay somewhere between $25,000 and $50,000 for their franchises. The area brokers would pay about $6000.

Let's come to the crucial question of obtaining sources of supply of cars. Although there is evidence about two master brokers obtaining cars independently of Nabcor, the vast majority of the cars about which there is evidence, were obtained by Nabcor.

Nabcor proposed to buy cars in volume. Under well-established and legal business practices, Nabcor could not buy from General Motors or Ford or Chrysler directly. Those manufacturers only sell, with some possible exceptions not applicable here, to franchised dealers. General Motors sells to franchised Buick dealers, Chevrolet dealers, Pontiac dealers and so forth.

So in order to get General Motors cars,

Nabcor had to purchase them from dealers. Nabcor's proposal, at least in theory, was that it would buy in volume from large franchised dealers and would buy at a very small mark-up, something like $25 or $50 or thereabouts, above what the dealer paid the manufacturer.

It is very important to note that Nabcor would not itself accumulate any inventory. Nabcor, like the brokers, was not in the business of having an auto showroom or having inventory or having repair facilities or having spare parts in stock. Nabcor would only respond to orders placed by its brokers, and if a broker sent in an order, then Nabcor would seek to fill that order by placing it with a dealer.

I think it's obvious from what I have already said that down farther in the line the broker would not do anything other than respond to orders. The broker would get an order from its customer and then place the order with Nabcor and Nabcor placed the order with the dealer. That's the crucial fact about the supply system, that the amount and type of cars needed by Nabcor was determined by how many orders were obtained by its brokers from customers and forwarded to Nabcor.

Now back to the situation where Nabcor does obtain a car. Nabcor has gotten an order from a broker, and let's assume that Nabcor placed the order with a dealer and gets the car for $25 or $50 above the dealer's price.

I won't get into the technicalities of title and agency, but, basically, that car is then resold to the ultimate customer, the customer of the broker. In general it appears from the evidence that the customer paid about $200 or $225 above what Nabcor had paid. So the net result was, if all this worked out, that probably the customer would be getting a car at a price considerably less than if the customer had gone to a franchise dealer and paid the regular retail markup.

We all know that there are lots of variations in the price of cars depending on whether the market is short or glutted or what, but, in general, the concept was that this device would mean that Nabcor's customers could get the benefit of a low markup by the dealer to Nabcor, and another fairly low markup by Nabcor to the customer.

This $200 or $225 profit which was obtained would be divided, according to particular formulas, between Nabcor and the broker, or if there was a master broker or an area broker in the picture they would get their share.

Whatever merits this type of business had, it had certain inherent problems which would inevitably exist without any alleged conspiracy involving General Motors or any other manufacturer.

First of all, Nabcor would have to persuade a dealer or dealers to sell to Nabcor at what is obviously a very low markup considering what the dealer might be able to get in a regular retail sale.

Of course the concept was that Nabcor was buying in volume. So in theory at least Nabcor might be expected to produce the volume. But in any event, there was the matter of inducing a dealer to part with its cars at a markup of $25 or $50 and possibly some slight additional profit to the dealer, depending on certain discounts or what have you. But, in any event, it would be a low markup compared with the regular retail markup.

Moreover, the brokers out in the field would lack showroom facilities or inventory, and although this had an advantage in cutting the overhead it also meant that they could not show actual cars, they could not demonstrate actual cars.

As I said before, Nabcor started functioning in 1966. In 1966 Nabcor sold 52 brokerage franchises and the evidence indicates that for those franchises Nabcor obtained about $150,000 in cash and about $80,000-odd in notes for a total of somewhere around $235,000 in cash and notes. These are approximate figures, but I think they're reasonably close.

In 1967 Nabcor sold 36 regular brokerage franchises and four master broker franchises.

In 1968 Nabcor sold eight regular franchises and two master broker franchises.

In 1969 Nabcor sold 14 area broker franchises and five master broker franchises.

In 1970, before December 10 of that year Nabcor sold 22 regular broker franchises, three area broker franchises, and three master broker franchises.

I think I have already indicated, basically, the process, that the concept was for the broker to get the order from the customer and submit it to Nabcor or in some cases to a master broker, and either Nabcor or the master broker would obtain the cars from the dealer.

In practice the system did not generate nearly as much business as was contemplated. I think the following is an indication of that, although there are many indications. Of the 52 brokers who were signed on in 1966 about 24 or 25 of them never submitted an order. Another dozen or so of these 52 brokers submitted four orders or less. I'm talking about the entire period up to December 10, 1970.

It appears that there were a total of 145 brokers who took out franchise agreements prior to December 10, 1970. These are listed on a particular exhibit. Of these 145, 68 of them never submitted a single order at any time up to December 10, 1970. 58 of them submitted less than ten during the entire time up to December 10, 1970. 11 of them submitted between 11 and 20 orders, and only about eight of them submitted more than 20 orders. Lest anyone think that General Motors or any of the defendants on trial here were somehow interfering with dealings between brokers and potential customers, there is no such evidence.

Now we come to the claim that General Motors conspired with its dealers to prevent Nabcor and the Nabcor system from obtaining cars.

In this connection there are basically two types of activity which plaintiffs have relied upon in the claim of conspiracy to prevent Nabcor and its system from getting cars.

The most important alleged type of activity in this regard is alleged specific failures to fill specific orders given by Nabcor or a master broker to a dealer.

A second type of activity is the alleged refusal to make a commitment for a large number of cars to be purchased in the future, in advance of specific orders for those cars. This has reference to the evidence about the alleged situation in Buffalo in the fall of 1967 where plaintiff General, a master broker, claims that it tried unsuccessfully to get commitments for 200 to 400 cars from different dealers.

With respect to the first type of alleged refusals to deal, the plaintiffs have provided a specification of the instances where they allege that Nabcor placed orders with a General Motors dealer and that dealer refused to fill the order or cancelled the order and this specification or course relates to instances where the plaintiffs claim this type of cancellation or refusal to deliver was the result of the alleged combination or conspiracy.

Naturally, if there was a failure to deliver, or a cancellation that had nothing to do with the alleged conspiracy, it would not be a part of plaintiffs' case. So plaintiffs have furnished a specification of the instances where plaintiffs claim that Nabcor placed orders with dealers and where the dealers refused to deliver or cancelled because of alleged conspiratorial activity.

This specification is contained in a group of documents which have been marked Plaintiffs' Exhibit 699 for identification. I will refer to Exhibit 699 in my further remarks.

In connection with the second type of alleged refusal to deal, the refusal to make commitments, I should allude here to something in addition to the alleged Buffalo activity in the fall of 1967. I believe that is a claim of another instance of such activity; that is, an instance where Paragon Oldsmobile, a defendant in this action, in December of 1966, or possibly January 1967, refused to make some kind of commitment.

I'm really probably rephrasing that claim stronger than the plaintiffs' counsel even states it, but I have examined the evidence and it really merits no further discussion. The evidence about it is too ephemeral, entirely lacking in any specification of a request for a commitment or a specific car, and there is nothing in that evidence which could possibly form the basis for any jury to find there was a refusal to make commitment at all, and I will make no further discussion of that evidence as to Paragon Oldsmobile.

I should note at this point that Nabcor kept a log, which apparently is substantially complete, as to the orders it received from brokers. However, it does not in all cases provide a very good history of what happened to those orders, and it has been difficult to arrive at anything like a complete reconstruction of what happened to those orders, although there are other records besides the log which have been useful.

General Motors has gone to great labor to try to reconstruct on the basis of all the records what happened to those orders; so there is a reconstruction which has been made for purposes of this action which is probably about as good as can be done at this stage, but it is not perfect because there are certain records and there is certain information which is simply lacking.

On the question of the conspiracy to boycott, the so-called Black List theory advanced by the plaintiffs, there is absolutely no direct evidence at all that anyone at General Motors at what is called the corporate level of General Motors, that is, with authority over all the divisions, directed a boycott of Nabcor.

There is evidence that persons at high levels in General Motors were advised of Nabcor as a potential competitor of the dealers; but that is a perfectly legitimate business activity.

It is perfectly legitimate for any business to keep advised of the competition, inform itself of the competition, and that activity, under no stretch of the imagination, in and of itself, can be called illegal; but I return to the proposition which I am convinced of, that as far as any direct evidence of conspiratorial activity at the General Motors corporate level there is simply none.

Furthermore, there is no direct evidence of any agreement among the divisions -- and I'm referring now to the motorcar divisions, Cadillac, Buick, Oldsmobile, Pontiac, Chevrolet, those five divisions -- or within any single division -- by any person or group of persons for the purpose of directing or carrying out a boycott of Nabcor or its system.

The real question in the case relates to circumstantial evidence, because that's where the reliance is placed by the plaintiffs. They claim that the circumstantial evidence adds up to the alleged conspiracy.

After an exhaustive review of the evidence as a whole, I find and hold that there is no circumstantial evidence and no evidence at all of any kind which would permit this jury to find that there was a conspiracy on the part of General Motors or any of its divisions to boycott Nabcor or its system.

At this point I think I should explain that there are two types of so-called years with which we have been involved. Naturally there is the chronological year, January 1, of a particular year, to December 31, of a particular year; but there has also been reference to model years. The model years are important in the chronology and will be referred to by me in my subsequent discussion.

The model year starts, according to the evidence, with the placing of orders and possibly some deliveries in the early fall. If we are speaking of the model year 1968 -- cars of the model year '68 are ordered and delivered commencing with the fall of 1967 through the summer of '68.

The most salient factor in my view in positively rebutting any inference of boycott or Black List conspiracy on the part of General Motors is as follows:

The time span involved in this action is December 10, 1966 to December 10, 1970. If we take the last three and a half years of that time span, that is, from mid-1967 to the end of 1970, there are only three instances listed in this Exhibit 699 as claims of refusals by General Motors dealers to fill orders for cars by Nabcor.

That's three instances over a three and a half year period. One of these instances relates to a Buick ordered from a dealer named Cunningham in September of 1968. Cunningham cancelled and the Buick was reordered from another dealer and delivered.

So that car was not actually, ultimately, denied Nabcor. The car was ultimately obtained. So there was an isolated example of one Buick dealer cancelling and the order immediately being placed with another Buick dealer and being filled.

There was also the instance of the Askew Chevrolet where there was an order by a man by the name of Askew in Washington for a Chevrolet in the fall of 1968 and he didn't get his car; by mid-1969 he cancelled his order.

But those obviously are two isolated instances out of hundreds in this entire three and a half year period.

At the beginning of my discussion here I mentioned there was a third instance of refusals to deliver referred to in Exhibit 699. But this relates to Cadillacs ordered in November and December of 1970; although those Cadillacs are listed in 699, it's now agreed that they're out of the case. They came too late. There is no evidence about them. So the Cadillacs at the end of the period, the third so-called instance of non-delivery contained in Exhibit 699, are just out of the case.

The net of it is that you have two isolated claims of non-delivery in this three and a half year period, cases where specific orders were denied and, indeed, one of them was ultimately filled by a second Buick dealer.

Let's put those instances in perspective as to what else was going on in this three and a half year period. Here's where I want to talk about the model years. It happens that this three and a half year period involves three model years. The time period I'm talking about, that last three and a half years, starts in the summer or fall of 1967.

That's the beginning of the 1968 model year, and then after that you have the 1969 model year and the 1970 model year.

The 1970 model year finishes up in the summer of 1970 and, of course, the time period in our lawsuit goes to December 10, 1970. One would think we would have some question about the 1970 model year or the first phase of it in the fall of 1970, but in the fall of 1970 there was a strike at General Motors and no cars were produced, so there is not any real issue in this case about what was happening in the fall of 1970.

I repeat: The last three and a half years of the time period involved, the three model years, are the 1968 model year, the 1969 model year and the 1970 model year.

Let's take it make by make for these three model years involved in the last three and a half years of this lawsuit.

Let's start with Chevrolet.

The first delivery of a 1968 model Chevrolet was made in November, 1967. It was Order No. 375.

Now, Nabcor's order log, Exhibit 450, shows 49 orders received by Nabcor from its brokers for 1968 Chevrolets. It shows 39 1968 Chevrolets delivered by Chevrolet dealers to Nabcor.

The evidence shows that Nabcor received 32 orders for 1969 Chevrolets from its brokers and the evidence further shows that Nabcor received delivery from Chevrolet dealers of 30 Chevrolets.

The evidence further shows that Nabcor received from its brokers orders for 37 1970 Chevrolets. The evidence shows that Nabcor received delivery from Chevrolet dealers of 39 1970 Chevrolets. Exactly why the deliveries exceeded the orders I don't know, but that is a frailty of the record-keeping system.

The net of it is that for these three model years Nabcor received orders from its brokers for a total of 118 Chevrolets and it received delivery from General Motors dealers of 106 Chevrolets.

There is a gap of 12, but I would find quite readily that gap of 12 is contrary to the idea of a conspiracy to boycott and, in any event, there is no claim by the plaintiffs that any of those 12 cars that were not delivered by the dealers involved any incident of conspiratorial conduct, except for the so-called Askew Chevrolet. This matter will be dealt with later in my statement.

The source of those Chevrolets for those three model years was Rohrer Chevrolet in Camden, New Jersey, although a few isolated purchases were from Matt Slap in Philadelphia, Norton in Philadelphia, Queen City Chevrolet in Cincinnati, Cerota Chevrolet in New Jersey and Luby Chevrolet in Queens.

With regard to the other makes of automobiles for these three years I think I will omit going year by year. The statistics are contained in the books prepared by General Motors, but I will give you the totals.

For the three model years 1968, 1969, 1970, Nabcor's order log reflects 109 orders for Pontiacs received by Nabcor from its brokers, and the record reflects 106 Pontiacs for these three model years delivered by General Motors dealers to Nabcor. That is 106 out of 109.

There is no claim in Exhibit 699 that there was any refusal to deliver or any cancellation by a dealer resulting from conspiratorial conduct in relation to these three model years of Pontiacs.

The source for most of the cars for these model years, that is, most of the Pontiacs, was Al Wilson Pontiac located near Philadelphia, which was the source for '68 and '69 model years and did steady business with Nabcor through June, 1969. Nabcor also purchased Pontiacs for those two model years from Block and Ruckle, two Pontiac dealers. Starting about October, 1969, for the 1970 model year, the main source of Pontiacs for Nabcor was Kline Pontiac in Doylestown, Pennsylvania, although there were a few purchases of 1970 Pontiacs from Apuzzo Pontiac.

For Oldsmobiles, the order log of Nabcor reflects that for these three model years there were a total of 26 orders received by Nabcor from its brokers. The records are slightly uncertain as to the total amount of deliveries obtained from Oldsmobile dealers, but it was either 20 or 21, and there is no allegation in Exhibit 699 that for those three model years there was any failure to deliver an Oldsmobile resulting from any conspiratorial conduct.

For these three model years, Nabcor bought from Al's Community Olds and from Marty Motors. Those were the two sources of Oldsmobiles.

We now come to Buick for these three model years, 1968, 1969 and 1970. The orders for Buicks for these three years reflected in Nabcor's order log were 64. Again, there is slight confusion in the record as to how many deliveries were made for these three model years by Buick dealers to Nabcor, but it was either 58 or 59.

Again, there is no claim in Exhibit 699 of any refusal to deal resulting from alleged conspiratorial conduct, except the situation which I mentioned earlier where one isolated Buick was cancelled by one dealer and reordered from another.

There is no evidence whatever to tie that transaction to any conspiratorial conduct.

For these three model years, Nabcor bought Buicks from Bano Buick, and from Bell Buick, which later became known as Foy Buick.

The final make of automobiles to be dealt with are Cadillacs and Nabcor did very little business in Cadillacs, at least for these three model years.

The order log shows 16 orders for 1968, 1969 and 1970 Cadillacs, received by Nabcor from its brokers, and the records show that nine Cadillacs were delivered.

There is no evidence whatever to indicate that any of the undelivered Cadillacs were the result of any conspiratorial activity by General Motors.

During this time Nabcor was buying Cadillacs from Marty Motors and from a company called Burke Cadillac.

I have gone through Nabcor's purchases for the three model years 1968, 1969 and 1970, embracing the last three and a half years of the period in suit. I would like now to allude to what happened to the master brokers who were ordering cars directly from dealers. That is General Auto Sales & Leasing and also Nabcor of East New York.

Beginning in December, 1967, General purchased at least 31 General Motors cars and two General Motors trucks. These are transactions which apparently can be identified. There were probably a few more purchases, perhaps up to about 36 or 37 cars, but there is no specific identification of the transactions.

All of these purchases by General related to the model years beginning with the 1968 year, and were in Buffalo, New York. 22 Chevrolets were bought from Gillogly Chevrolet, 3 Pontiacs bought from a dealer by the name of Brown. Oldsmobiles were ordered or bought, according to the identified transactions.

There were 5 Buicks bought from Paul Batt Buick and 1 Cadillac bought from Keyser Cadillac.

There were also 2 General Motors trucks bought from Meier Schule.

Nabcor East bought mainly through Nabcor, but made at least 6 direct purchases for 1968, 1969 and 1970 model years. Nabcor East bought 1 Oldsmobile from Marty Motors, 2 Buicks from Bano Buick and 3 Pontiacs from Apuzzo.

I would like to sum up the grand total for 1968, 1969 and 1970 model years. The number of Nabcor purchases from General Motors dealers of the five makes of cars, and including the minimums where there was a difference in the figures, were as follows:

Chevrolets 106; Pontiacs 106; Oldsmobiles 20; Buick 58; Cadillacs 9, a total of 299 cars.

In addition to that, General purchased 31 cars and Nabcor East purchased 6. The total of all those figures is 336 cars. So there were 336 cars and 2 trucks bought by Nabcor, General and Nabcor East, during the last three and a half years of this lawsuit relating to the 1968, 1969 and 1970 model years.

These vehicles were purchased from a total of 20 General Motors auto dealers and one truck dealer.

I think on this evidence no jury in my view could possibly and reasonably find that General Motors engaged in a conspiracy to boycott or deprive Nabcor and its system of automobiles during that last three and a half year period involved in the lawsuit.

In connection with the number of dealers it should be pointed out that by and large Nabcor sought to obtain a single source of supply to the extent possible for each make of cars. Of course, it may have made isolated purchases from other sources of supply at the time it was dealing with its main source of supply for a particular make.

These sources of supply changed from time to time, but Nabcor was only seeking to deal with a limited number of dealers to supply its demands. Obviously, the same was true with respect to General and Nabcor East.

The dealers with which Nabcor dealt and with which Nabcor East dealt were in the Philadelphia-New York area mainly, although there were one or two dealers dealt with in New Jersey.

Of course, General bought its cars in the

Buffalo area.

I have mentioned the last three and a half years, and that leaves the first half-year. I believe it is necessary to analyze the evidence about that first half-year. We are dealing with a period of time between December 10, 1966, and approximately June, 1967. Of course, we have received evidence by way of background of events occurring earlier in 1966 than December 10.

Again, in connection with this first half of year of the alleged conspiracy, I will try to analyze the evidence according to the different makes of cars. I will start with Chevrolet.

Nabcor's first main source of supply for Chevrolets was Luby Chevrolet of Queens. Nabcor bought at least 14 Chevrolets from Luby from June, 1966, to March, 1967.

In connection with the 1967 model year the records of Nabcor present somewhat greater problems than with respect to subsequent model years. The evidence for the 1967 model year shows certain deliveries obtained by Nabcor identified by serial number, and these deliveries are definitely established.

In addition, the records indicate the probability that substantial numbers of additional cars were delivered, whose serial numbers are not identified in the available records.

In any event, during the period June 6, 1966, through March, 1967, Nabcor bought about 14 Chevrolets from Luby at a minimum and probably bought more, the maximum figure being about 27.

Nabcor and Luby terminated their business relationship in March, 1967. Actually the last order taken by Luby was somewhat earlier, although the last delivery was in March.

Although the jury could find that it was Luby, not Nabcor, who severed the relationship, there is no evidence as to the reason, and no evidence that any conspiratorial conduct of General Motors was responsible.

At about that time Nabcor switched for its source of supply of Chevrolets to Matt Slap of Philadelphia and between January, 1967, and July, 1967, that is for the rest of that model year, Nabcor bought at least 16 cars from Matt Slap, probably more.

Nabcor also bought at least 10 Chevrolets from A.C. Chevrolet in the period April to July, 1967.

So for the last part of the 1967 model year, Nabcor's main sources of supply for Chevrolets were Matt

Slap and A.C. Chevrolet.

In this Exhibit 699 there are certain allegations and claims of denial of cars because of alleged conspiratorial activity for the 1967 model year. I will deal with them now.

It is claimed that in late 1966 Nabcor placed an order for 10 or 11 Chevrolets with a dealer in New York City by the name of Don Allen Chevrolet Company. There really is no dispute those orders were placed.

It is further undisputed that in early December, 1966, Don Allen Chevrolet, which had been an independent franchised dealer of General Motors, ceased to function as such and that that dealership was taken over by General Motors and renamed Mid-Town Chevrolet.

Thereafter the dealership simply functioned as a branch of General Motors.

Treating the evidence most favorably to the plaintiffs' side, it would appear that when Mid-Town took over, the 10 or 11 Chevrolets that had been ordered by Nabcor arrived and delivery of these Chevrolets to Nabcor was held up by the Mid-Town personnel who were employees of General Motors.

Frank Maiorana has testified that he complained about this hold-up and talked to two persons at Mid-Town. Mr. Maiorana states that they at first told him he could not get the cars, told him that Nabcor was bootlegging and did not have a fleet certificate, and further told him that Mid-Town was not in the business of selling to bootleggers who would compete with franchised dealers; that Mid-Town was interested in holding up the price for the benefit of franchised dealers.

For purposes of this motion I must assume the fruth of that testimony. However, the net result of all of it was that shortly after these conversations Mid-Town agreed, according to the testimony of Frank Maiorana, to allow Nabcor to take delivery of these cars. But Nabcor cancelled all of those orders except 2.

There are two points to be noted about the Mid-Town transaction. One is that the statements attributed to the two Mid-Town personnel might be considered as part of some evidence of conspiratorial intent or activity on the part of General Motors if there was other evidence to add to it, indicating conspiratorial intent and activity.

I don't want to treat the Midtown situation entirely in isolation. Part of the job here is to take these isolated instances and see how they add up, and

I have analyzed the evidence in that fashion. But, as already indicated, I have concluded that, taking the plaintiffs' evidence as a whole, there is no sufficient evidence from which a jury could find conspiracy.

However, taking the Mid-Town situation in and of itself, some further things can be said. One is that Mid-Town was simply a branch of General Motors, and General Motors has a right unilaterally not to sell Nabcor cars. As far as the antitrust laws are concerned it has that right.

If Mid-Town refused to deliver those cars it might constitute a breach of contract action but not a violation of antitrust laws. A familiar antitrust doctrine is that someone has a right to refuse to deal provided they don't get involved in contractual arrangements with other people to boycott.

Secondly, the salient fact is that the net result of the conversations at Mid-Town was to offer Nabcor the ten or eleven cars and Nabcor cancelled all but two.

Now we come to the second claim about 1967 Chevrolets contained in Exhibit 699. 699 contains allegations that there were three cars denied Nabcor by Luby Chevrolet, and apparently the theory is that that was the result of conspiratorial activity in the part of General Motors. There was indeed one Chevrolet ordered by Nabcor from Luby in November of 1966 and this was cancelled. However, there is no evidence whatever as to why it was cancelled or who cancelled it.

Also the November, 1966 order from Luby occurred in a month when between nine and 15 Chevrolets were delivered by Luby to Nabcor.

The other Luby Chevrolets referred to in Exhibit 699 were ordered by Nabcor from Luby on December 21, 1966, and on January 11, 1967. As indicated earlier, a jury could find that at the beginning of 1967, Luby decided to stop doing business with Nabcor, at least on a steady basis.

The jury could certainly find that this compelled Nabcor to reorder those cars, and it did, in fact, reorder the cars from Matt Slap, to whom it turned at this time for its source of supply of Chevrolets, and those cars were delivered by Slap.

The claim is that Luby's cessation of dealing with Nabcor on a regular basis was the result of conspiratorial activity. There is no evidence whatsoever to support that claim. There is no evidence regarding the reason why Luby terminated, and in the absence of such evidence, one could speculate about any number of possible reasons why the business terminated.

There is no evidence connecting General Motors to these cancellations or to the termination of business.

In respect to this first period of the lawsuit ending in the summer of 1967, I must also deal with two claims embraced in Exhibit 699 relating to A.C. Chevrolet. It is claimed that Nabcor ordered a car from A.C. Chevrolet on April 11, 1967, and that this order was cancelled.

There is also another car which was cancelled at some point around June with respect to A.C. Chevrolet. But again, there is no evidence whatever tying these cancellations to conspiratorial activity or to General Motors.

Indeed, the evidence positively indicates that what was happening with A.C. Chevrolet was that they were palming off demonstrators as new cars and Nabcor decided to drop A.C. Chevrolet.

My conclusion regarding Chevrolets relating to the first half year of the conspiracy is as follows:

The records are not in the best shape, but the order log shows 55 orders for Chevrolets relating to the 1967 model year, that is, from the fall of 1966 to the summer of 1967 -- and I'm referring to orders from Nabcor brokers to Nabcor. A minimum of 41 Chevrolets were delivered by Chevrolet dealers to Nabcor during this time.

The evidence shows clearly that there were more than the 41. How many more I cannot say, but the maximum possible under the records is 67. Nabcor dealt during this time with eight different Chevrolet dealers. My conclusion with regard to Chevrolet transactions in the first half year of the conspiracy is that there is no evidence from which a jury could conclude that there was a conspiracy by General Motors and others to prevent delivery of Chevrolets to Nabcor.

Now we come to the Pontiac transactions in the first half year or so of the conspiracy.

In the early stages of Nabcor's business Nabcor's source of Pontiacs was Ruckle Pontiac of Yonkers, New York. Nabcor bought at least 25 Pontiacs from Ruckle during the period June, 1966 through March of 1967.

In March of 1967 Ruckle decided that it would do no further business with Nabcor and it sent back nine outstanding orders. Nabcor contends that the cancellation and return of these nine orders and the cessation of business is tied to conspiratorial activity on the part of General Motors. However, the only testimony as to the reason why Ruckle cancelled its business with Nabcor was to the effect that Ruckle did so entirely by its own decision and was not responding to pressure or suggestion or agreement with General Motors.

It is true that Mr. Dillon of Ruckle testified that shortly before his decision to cancel his firm's business with Nabcor, a Mr. McNamara from General Motors came to see him.

However, Dillon's testimony, which is uncontradicted and unimpeached, is that McNamara did not suggest a cessation of business with Nabcor. McNamara simply said, "I have a relative or a friend who is interested in buying a Nabcor franchise. Can you tell me something about it?"

Dillon testified that he did not personally know about Nabcor at the time, but was told about Nabcor by his fleet sales manager, Stewart. Dillon concluded that Nabcor was a ripoff and he decided he didn't want to sell to Nabcor any more.

It might be a suspicious circumstance that a General Motors representative arrived and talked with Dillon shortly before Dillon's decision to cancel out the business with Nabcor. One might be skeptical about Dillon's testimony and one might wonder whether something else was said in place of what Dillon said was said.

However, McNamara was not called as a witness and no testimony is in this record contrary to what Dillon testified to.

It should also be noted that Ruckle Pontiac was in the New York zone of Pontiac. Immediately after the cancellation and return of the nine Ruckle orders to Nabcor, Nabcor started buying Pontiacs from Bates Pontiac. Bates Pontiac is in the Bronx. Bates Pontiac is also in the New York zone of the Pontiac division.

Nabcor bought Pontiacs from Bates during the period March, 1967 through part of June, 1967. In Exhibit 699 there is a complaint about five Pontiacs ordered from Bates in May of 1967 which were not delivered. Nabcor and Bates ceased doing business in June of 1967. But there is absolutely no evidence as to the reason for the non-delivery of the five orders. There is no evidence as to who cancelled. There is no evidence whatever regarding the reason why Nabcor and Bates ceased doing business.

There are any number of possible reasons why Nabcor and a dealer might stop doing business with each other. The mere cessation of business cannot lead to any inference of conspiratorial conduct by General Motors.

Indeed, Nabcor immediately replaced Bates as a source of supply in June of 1967, and it went to Al Wilson Pontiac in Philadelphia and bought Pontiacs from Al Wilson from June of '67 through June of 1969, and bought at least 86 Pontiacs from Al Wilson.

So, to summarize the situation about Pontiacs through the summer of 1967, the order log reflects 64 orders received by Nabcor from brokers for Pontiacs during this time; at least 51 and a maximum of 71 1967 Pontiacs were delivered by Pontiac dealers to Nabcor. They came from four Pontiac dealers.

Taken with all the other evidence in the case I find that there is no evidence from which a jury could conclude there was a conspiracy during this first half year of the alleged conspiracy period to deprive Nabcor of Pontiacs.

The source of Buicks for Nabcor for the 1967 model year, that is through the summer of 1967, was mainly Kutner Buick, although purchases were also made from a company called Sharkey Buick. The only complaint in Exhibit 699 about Buicks in respect to the 1967 model year is in relation to a Buick which Nabcor ordered from Kutner in May of 1967. It apparently did not turn out to be acceptable because the tires were oversized. There is no evidence at all tying this to any conspiracy.

So as far as Buicks are concerned, the log reflects 32 orders from brokers to Nabcor. Due to the difficulties in the records the number of deliveries made by Buick dealers to Nabcor is not definitely fixed. It was at least 21 and a maximum of 31 Buick cars. Again, there is simply no evidence of any conspiracy to deprive Nabcor of Buicks during this first half year of the alleged conspiracy.

With regard to Oldsmobiles, the only claim in Exhibit 699 respects one Oldsmobile ordered from Rosenstock in May of 1967. Nabcor claims there was a refusal by Rosenstock to accept the order. There is simply no evidence of what happened here and the reason why that transaction turned out the way it did.

The summary of the Oldsmobile transactions at this time is that the order log reflects nine orders received by Nabcor for 1967 model Oldsmobiles. Either eight or nine Oldsmobiles were delivered for the 1967 model year.

Nabcor obtained Oldsmobiles from three Oldsmobile dealers, Kraus, Rosenstock and Al's. There is no evidence that a jury could find a conspiracy to deprive Nabcor of Oldsmobiles during this time.

I would like to take a recess. I have some more of my statement to dictate. The jury is welcome to stay or they are welcome to leave. If you are interested you can stay, if not, as far as the case is concerned and the requirements of the case, since I am dismissing the case, why, the jury is discharged and I want to extend to you at this time, in case any of you wish to leave, thanks for your hard work, your obviously close attention, and your patience during our numerous legal discussions. You did a fine job as citizens. This is all part of the process, no matter how it turns out. You have certainly done your job.

If you would like to stay, I'll continue with this and you can do as you wish. I would appreicate it, however, there be no discussion although you are discharged from your duties. It would be inappropriate of you to have discussions of any kind with any of the counsel. If you are going to stay, keep to the jury room as per usual.

MR. PERSON: Does that mean after even they leave the court we won't be able to communicate with them?

THE COURT: I'll cover that later.

MR. PERSON: So they may know before departing.

THE COURT: What I would say is you are free after you leave the court to talk to whomever you wish about the case. However, you are free not to talk. No litigant and no lawyer has any right to harass you or impose upon your time or do anything that would inconvenience you or disturb you in any way. You are perfectly free to refuse to talk. It is entirely up to you from here on out.

If any litigant or any lawyer imposes upon you, or disturbs you, you are to call my office immediately and I will remedy the situation.

MR. PERSON: I would like to object to that instruction if it's meant --

THE COURT: There is no objection, none.

MR. PERSON: I would like to contact them and if they wish to talk --

THE COURT: I made it clear. This is a very standard instruction. I'm giving it and I'm giving it for the guidance of all concerned and for the benefit of all concerned.

We'll have a recess.

(Recess)

THE COURT: I will resume my statement. I left off before I came to the Cadillac situation in respect to the 1967 model year, that is, the Cadillac situation up through the first half year of the period in suit.

This brings us to the mysterious Colonial Cadillac orders. Although Nabcor never received for any model year subsequent to 1967 in excess of eight orders for Cadillacs, Nabcor contends that in the Fall of 1966 it received some 45 orders for 1967 model year Cadillacs.

The records show that 3 1967 Cadillacs were obtained from General Motors dealers, namely, from Wayne and Marty. However, Nabcor contends that it placed orders for 43 Cadillacs with Colonial Cadillac of Trenton, New Jersey; that these orders were placed with Colonial in the Fall of 1966, and Nabcor contends that due to conspiratorial activity, none of the 43 orders were filled by Colonial.

Two witnesses from Colonial Cadillac appeared at the trial. They denied having any knowledge of such orders. No records of Colonial Cadillac reflecting such orders have been found despite rather unusual efforts to locate them. These efforts included obtaining the return of some documents from the Department of Justice, which Colonial Cadillac had furnished to the Department at an earlier time in connection with the antitrust complaint of Nabcor.

The documents of Colonial which were surrendered to the Department and returned during this trial contain no records whatever of the 43 alleged orders. Except in the case of two or possibly a very few more instances, Nabcor came up with no copies of any order documents. However, Frank Maiorana has testified the orders were placed with Colonial and if the jury believed Frank Maiorana they could find that these orders were placed. The jury could conclude, if it believed Frank Maiorana, that Nabcor placed the orders with Colonial, and none of the orders were filled.

When I say none of the orders were filled, I have to quality this because Frank Maiorana did admit that in a couple of cases Colonial Cadillac supplied Cadillacs for these orders, although the particular cars offered were not precisely what had been ordered.

The main question, however, is this: Could the jury find, would the jury have any evidence on which it could find, that the alleged refusal by Colonial to deliver these 43 cars resulted from any conspiratorial activity of General Motors?

The Colonial witnesses have testified that General Motors never communicated or took any other action to discourage or frustrate the filling of orders received from Nabcor. Indeed, there is no evidence from any source of General Motors communicating or performing any activity to frustrate the alleged Colonial orders.

Again, we have a situation where there might be many reasons why a dealer would not want to deal with Nabcor and in the absence of some evidence of conspiratorial activity in the part of General Motors as a cause for non-dealing the jury would be in a position of simply speculating if the issue went to the jury.

I have considered the evidence about the Colonial transactions in relation to the various other evidence in the case, particularly in relation to the contention that a company named Marty Motors which dealt in Cadillacs and Oldsmobiles, engaged in some kind of subterfuge.

What I have reference to is the contention that Marty Motors, in selling Cadillacs to Nabcor at a later time, in 1968 and 1969, put the title to the cars in the Nabcor customer rather than in Nabcor, and the claim is that this was done because the Cadillac division didn't want Marty to deal with Nabcor and Marty was trying to conceal the transaction. The witnesses from Marty Motors have denied that their handling of the title to these cars had anything to do with any instructions or communications from the Cadillac division.

Plaintiffs have introduced evidence of prior inconsistent statements in an attempt to impeach the testimony of at least one of the Marty Motors witnesses in this regard. The jury could certainly consider whether the Marty Motors witnesses were telling the truth.

However, there is on the present record

simply no affirmative evidence that General Motors was pressuring Marty Motors not to sell to Nabcor or was communicating in any other way with Marty Motors in such a way as to cause Marty Motors to conceal the transactions.

In any event, there is no showing whatever that there is any connection between the Marty Motors situation and the Colonial situation. The Marty Motors situation is rather vague and deals with some isolated instances occurring much later than the Colonial Cadillac transactions or alleged transactions.

In view of the evidence as a whole, I cannot find that there is any evidence from which the jury could conclude that the Cadillac division of General Motors or anyone else at General Motors was communicating with or pressuring either Colonial or Marty Motors not to sell Cadillacs to Nabcor.

The fact is that during the entire time in question -- I'm talking about the entire time up to December 10, 1970 -- the record shows that Nabcor received very few Cadillac orders, 22 orders if the alleged Colonial orders are excluded and 65 if they are included. A total of 13 Cadillacs was delivered by three or four dealers.

The alleged rush of Cadillac orders in the fall of 1966 was an aberattion from the norm. The jury could certainly find that it happened. But there is no evidence from which the jury could find the failure to obtain these alleged orders resulted from conspiratorial conduct on the part of General Motors.

Before going further in my statement, I should mention something which has been referred to frequently at the trial -- that is, the fleet certificate. There is a separate section of General Motors which handles the issuance of fleet certificates. These certificates are issued to purchasers of cars, such as auto leasing companies, which have a certain number of cars registered in their names. In this case, General Motors takes the position that the fleet certificate is pretty much a public relations device, and has no relationship, relevant to this case, to more substantial benefits such as fleet discounts or fleet allotments. The plaintiffs contend that, where a customer has a fleet certificate, this is of assistance in obtaining cars, because a dealer can get a fleet allotment to supply those cars.

On the present record the jury could find that although there was no formal connection between fleet certificates and fleet allotments, there might have been a de facto connection which helped a fleet certificate holder to obtain cars under a fleet allotment.

But, as I have already indicated, this entire problem of fleet allotment is simply academic in the present case because there is no evidence whatever that any cars were denied to Nabcor because of the failure of any dealer to obtain a fleet allotment for such cars.

Plaintiffs have placed much emphasis on certain sporadic statements made by General Motors employees, which plaintiffs contend constituted conspiratorial conduct or admissions of such conduct. For the purposes of this motion the credibility of plaintiffs' evidence in this regard will be assumed.

Frank Maiorana testified that he spoke to Walter Gray of the New York zone of Pontiac in November or December, 1966 on the subject of obtaining a fleet certificate for Nabcor. Frank Maiorana testified that Gray referred to Nabcor as a bootlegger, and that no fleet certificate was obtained.

Although Gray allegedly used the pejorative term "bootlegger", he did not in fact threaten any boycott or other conspiratorial conduct, or say anything to admit such conduct. As to the fleet certificate, the evidence is conclusive that, under the rules and regulations of General Motors which were adopted entirely apart from any consideration of Nabcor or Nabcor-type companies, Nabcor did not meet the requirements for obtaining such a certificate.

Certain other allegedly inculpatory statements were made at this period of time by employees of Midtown Chevrolet, a dealer owned by General Motors. These alleged statements have already been described. To recapitulate, Frank Maiorana testified that in December, 1966 or January, 1967 Englert of Midtown and his boss called Nabcor a bootlegger, stated that they did not wish to deliver certain Chevrolets to Nabcor at the low fleet price, and stated that Midtown was supposed to uphold a higher price for the benefit of other dealers. As already described, Midtown ultimately agreed to sell these cars at the low fleet prices, but Nabcor canceled all but two of the orders.

In connection with the allegations of statements by General Motors employees in the fall of 1966 or early 1967, I should probably refer to the Pontiac employee, McNamara, who spoke to Dillon of Ruckle Pontiac in the fall of 1966. This conversation has already been described, and is to the effect that there was no threat to Ruckle or request that Ruckle cease dealing with Nabcor, and that Ruckle's cessation of business with Nabcor was solely from Ruckle's own volition.

In my view, when all the evidence is considered, a jury could not reasonably find conspiratorial conduct on the basis of these statements by General Motors employees.

When I say conspiratorial conduct I am, of course, speaking of conduct designed to prevent dealers from selling cars to Nabcor. In this regard, there is no direct evidence that Gray or McNamara or anyone else at Pontiac or General Motors was directing or requesting Pontiac dealers to refuse to deliver cars to Nabcor. Plaintiffs' argument is that the inference can be drawn circumstantially from Gray's statement and McNamara's conversation with Dillon, and other evidence, that General Motors was in fact pressuring Pontiac dealers not to deal with Nabcor. However, I conclude that no such inference can logically be drawn, and that any finding of such pressure would be based on pure speculation.

The salient fact is that, after the Gray and

McNamara conversations in November or December, 1966, Ruckle Pontiac kept selling cars to Nabcor, and delivered 22 cars from November, 1966 through March, 1967. At that point Nabcor immediately switched to another dealer in the same zone, the New York zone, Bates Pontiac, from which it obtained 18 cars from March, 1967 through June, 1967.

With regard to Chevrolets, the alleged statements of Englert and his boss were merely the statements of two persons at a factory-owned Chevrolet dealer. As to any evidence of some person or persons higher up in Chevrolet or General Motors directing a boycott of Nabcor, there is simply no direct evidence of such activities. Nor is there any sufficient circumstantial evidence which would permit a jury to find such a boycott at the time we are discussing -- late 1966 and early 1967. The fact is that Nabcor purchased Chevrolets from Luby Chevrolet in Queens until early 1967, and then switched to Matt Slap Chevrolet in Philadelphia and A.C. Chevrolet in Jersey City, from whom Nabcor bought substantial numbers of Chevrolets through the end of the 1967 model year.

The next matter which must be dealt with is the allegation of conspiratorial conduct by General

Motors and franchised dealers in Buffalo in the fall of 1967.

Buffalo Automobile Dealers Association issued a bulletin on September 29, 1967 commenting most unfavorably on Nabcor and other auto brokers, and expressing the view that no retail dealer would want to get involved in such a scheme.

Nabcor's master broker in Buffalo, plaintiff General Auto Sales and Leasing, is claimed to have approached defendants Gillogly Chevrolet, Bain Chevrolet, Campbell Chevrolet, and Batt Buick in the fall of 1967. Plaintiffs' testimony is that these and other General Motors dealers were asked by General Auto Sales about supplying large numbers of cars over a period of a year -- around 200 to 400 cars. The testimony is that, after some initial expressions of interest, the dealers refused to make commitments to General Auto Sales.

Donald Bolling of General testified that in early October, 1967 he witnessed an employee of the Buffalo zone of Chevrolet named English threatening Gillogly Chevrolet that if any dealer was caught selling to Nabcor that dealer would have trouble getting cars.

Plaintiffs' witnesses have also testified that a representative of Bain Chevrolet said that that dealer could not sell to Nabcor because Chevrolet would not permit it.

However, the important fact about the proposals or discussions in the fall of 1967 is that, except for a trivial number of orders which the representatives of General were carrying around to offer as bait to the dealers, General was not seeking to place actual orders for cars at this time. Also English, who allegedly made the threats at Gillogly Chevrolet, was a rather low level General Motors employee who could not commit the corporation to a course of conduct.

To the extent that General actually came back to any of these dealers with actual orders for cars, these orders were filled. Beginning in the very early part of 1968 and continuing through the end of 1969 at least, Gillogly, Bain, Batt and other General Motors dealers in Buffalo sold cars to General.

I should note that, as to Campbell, there is no evidence that General ever came back to that dealer with any specific orders.

Gillogly went so far as to request certain fleet rebates for General in the summer of 1968. The request was approved by the manager of the Buffalo zone of Chevrolet, Womack. Womack was the superior of English.

I should also refer to a situation about defendant Batt Buick. There is a claim that a Buick car was ordered by General from Batt in December, 1967; that it was delivered to Batt for General in January, 1968; and that the car was withdrawn suddenly by General Motors and had to be reordered.

In light of all the circumstances, this is a matter of no consequence. The explanation for the recall upon the first order was that there was a malfunction, and there is no evidence to rebut this. Moreover, the car was immediately reordered by Batt and was delivered. Batt continued to supply Buicks to General thereafter.

There is another series of incidents which needs to be dealt with, which occurred in December, 1967 and January, 1968.

According to Anthony Maiorana's testimony, on December 12 or 13, 1967 there was a discussion at Nabcor's office in Jenkintown, Pennsylvania between Anthony Maiorana and two General Motors employees named Speece and DiSimone. DiSimone was in the fleet certificate section of General Motors. Speece was with the Philadelphia zone of Chevrolet. The reason for this discussion apparently related to an application by Rohrer Chevrolet, dated November 22, 1967, for fleet rebates on cars sold to Nabcor.

Anthony Maiorana testified that there was a discussion about the Nabcor system and about the fact that Nabcor obtained Chevrolets from Rohrer. The testimony is that Speece and DiSimone said that Nabcor was not qualified to buy and resell cars, that dealers would not sell to Nabcor for resale, and that they would see to it that Nabcor could get no cars for resale.

On December 15, 1967 Frank Maiorana had the first of a series of talks with a Mr. Belcher, an assistant to the chairman of the board of General Motors. Frank Maiorana claims that he told Belcher about various alleged problems about getting cars, including a problem in Buffalo, and that Belcher suggested that a fleet certificate might assist in solving the problem. There is no claim that Belcher at any time made threats or made admissions of conduct of a conspiratorial nature.

During the time of the talks with Belcher, Frank Maiorana was referred to other General Motors employees, and discussed the possibility of setting up a small leasing company, with GMAC financing, for the purpose of helping Nabcor get a fleet certificate.

In the series of conversations, beginning December 15, 1967, the only alleged inculpatory statements occurred when Frank Maiorana claims to have talked to Speece and DiSimone. Frank Maiorana testified that Speece said that Nabcor was bootlegging. Frank Maiorana testified that DiSimone said that General Motors was not in the business of selling cars to resellers.

However, with respect to the actual activities of the Philadelphia zone of Chevrolet, plaintiffs' own evidence is that Matt Slap, a Chevrolet dealer in Philadelphia, was agreeable to selling Chevrolets to Nabcor for the setting up of the leasing company, and assisted in Nabcor's attempt to obtain financing from GMAC. The manager of the Philadelphia office of GMAC, Thomas, approved the financing application. The undisputed evidence is that the financing application, upon which this entire arrangement depended, was never indeed turned down by GMAC. GMAC attempted to obtain additional information from Frank Maiorana, which he refused to provide.

Also, during these discussions, a General Motors employee named Karney, requested Frank Maiorana to provide specifics regarding Maiorana's complaints about mistreatment in Buffalo. Frank Maiorana refused to provide such specifics.

A fact of overriding importantce is that, at the time of these conversations in late 1967 and early 1968, Nabcor was obtaining, and continued to obtain, basically all the cars it ordered from various General Motors dealers. These included Rohrer Chevrolet, the dealer allegedly mentioned in the discussions between Anthony Maiorana and Speece and DiSimone.

There is an allegation that in 1969 a car ordered by a Mr. Askew in Washington, that is a Chevrolet car, was not delivered. Askew had turned in his order in 1968 and the claim is that that order was given to Matt Slap in Philadelphia and after several months no car materialized and the customer finally cancelled.

Frank Maiorana alleges that in trying to track this matter down he talked to a Mr. Lowe, an employee of the office of Chevrolet in Chevy Chase, Maryland, and Mr. Lowe told him in Mid-1969 that General

Motors was not supposed to be selling to dealers who were selling to resellers.

This is an unfortunate statement if it occurred, but the fact is that this is an isolated instance in the midst of many successfully completed sales by Chevrolet, Pontiac, and other General Motors car dealers to Nabcor.

Another statement of the same ilk is supposed to have been uttered by Mr. Douglas of the New York Chevrolet zone in 1969. It appears that for some reason Nabcor ordered two or three Chevrolets from a dealer in Cincinnati by the name of Queen City.

On inquiry about these, during some slight holdup, Mr. Douglas of the Chevrolet zone is supposed to have told Frank Maiorana that Nabcor was a bootlegger and there would be no delivery to bootleggers. However, the cars were delivered in short order and the incidents have no particular substance.

I conclude that the evidence about these various incidents, starting with the conversations in November or December, 1966, taken along with all the other evidence, provides no basis for any jury finding of conspiratorial activity on the part of General Motors or GMAC. With respect to the Buffalo situation, where the claim involves not only General Motors but four defendant dealers and the defendant association, I conclude that there is insufficient evidence upon which a jury could make a finding of any conspiracy which caused any damage to plaintiffs.

I need to cover briefly a few other points. There is a claim in this case that in addition to the alleged refusal to sell, there were problems created by delays in delivery.

Plaintiffs' view apparently is that if the proof is weak about the claim of refusal to deliver cars to Nabcor, the fall-back position is that there were delays in delivery which caused Nabcor some trouble.

Frank Maiorana testified that dealers should supply cars in 28 to 30 days. I think this testimony has to be viewed in the light of a publication put out by Nabcor as a training manual for its brokers, and in this publication, which is Exhibit 648, Nabcor stated to its brokers that the normal delivery of an automobile would take from four to six weeks.

The training manual went on to state that even this four-to-six-week delivery might not be able to be complied with because there are problems with the computer system, the ordering of parts and so forth, and the prospective Nabcor broker was warned there might be a two, three or even four-week delay beyond the four to six weeks which was normal.

Mr. Maiorana never denied this, and his testimony as to what should happen doesn't really in any way rebut what is stated in the training manual as to what does happen.

Plaintiffs' counsel has supplied the Court with a list of all transactions where cars took more than 39 days to obtain from General Motors dealers. These situations can be dealt with briefly. A great many of them are about 40 or so days, 41 days, 43 days, 44 days; in other words, very, very close to the six weeks referred to in the training manual.

In any event, looking at the record of delivery times overall, the claimed delays were sporadic and there is simply no basis in the record for any possible finding that delays were caused by conspiratorial activity.

One other thing I should return to briefly is this question about the allotments. There was a great deal of argument by Nabcor here and a great deal of evidence put on about the claim that the fleet allotment was not available to a dealer in connection with obtaining cars for resale to Nabcor.

I merely repeat what I said earlier, that there is no evidence that any specific car was either denied to Nabcor or was delayed in delivery to Nabcor because of any problem about allotments.

I discussed with plaintiffs' counsel during the argument the type of evidence which would be necessary to show support for such a contention, and I refer back to that without repeating it. There is simply no evidence of this kind.

Therefore, any claim about the so-called White List problem on the allocation problem or the fleet allotment problem or the fleet certificate problem, is entirely academic as far as the actual facts of this case are concerned.

I should add a few points about damages. There is a contention that the activities of General Motors were such as to severely impair the business of Nabcor in late 1966 and early 1967, and that this was a direct causal factor leading to Nabcor's withdrawal from the automobile business. This is totally unrealistic, in view of the financial statements which show substantial amounts of sales of both automobiles and

and franchises for the fiscal years ending January 31, 1968, 1969, 1970 and 1971. Also, Nabcor stayed in the automobile business until the spring of 1973.

Damage theories have been proposed about loss of huge amounts of automobile and franchise sales. Without going into detail, I simply state that these theories involve projections which have no relation to reality.

With respect to an allegation that certain brokers terminated because of problems related to General Motors, I note that any attempt to develop the reason why a particular broker did little business, did no business, or terminated doing business, would require specific analysis and evidence with respect to the activities of that broker.

There has been no such analysis or evidence that could lead to the conclusion that any broker terminated on account of the activities of General Motors or the alleged conspiracy.

I note that in a list of prospective witnesses supplied to the Court and to defense counsel during the trial, relating to additional witnesses to be called, there was a group of some dozen witnesses who were franchisees or connected with franchisees.

None of them were called except the Donald Bolling of General. So this line of proof simply was not developed at all.

Although this has been a very long statement and much longer than I intended, much more could be said. The fact is that as the case is analyzed, and I think analyzed by any objective person, the farther one gets, the deeper one gets, the more conclusive the proof is that there is simply no ground for recovery on the part of any of plaintiffs here, and that is the reason why I am dismissing the case.

I have dealt with Count 1 and Count 3 in my statement. The one thing I think still remains to be discussed, and I am sure it can be handled briefly, is that little bit of Count 17 which is left.

Can you refresh my memory and take care of that quickly?

MR. KAPLAN: Yes, your Honor. The fragment of Count 17 that remains is the assertion by plaintiffs that General Motors had a financing plan available to leasing companies and that its unavailability to Nabcor violated the Robinson-Patman Act. In particular it makes the assertion that plaintiffs made application for financing under that plan which your Honor has discussed in your opinion and that it was denied.

Unless there needs to be further argument or a summary of the grounds we moved on --

THE COURT: That is dismissed.

MR. KAPLAN: Your Honor hasn't mentioned the claims of the individual plaintiffs. That is the only thing I can see. That hasn't been mentioned.

THE COURT: Well, I thought it was embraced --

MR. KAPLAN: It certainly is.

THE COURT: Now, I would add a word.

I think that General Motors clearly is right, that individual plaintiffs Frank Maiorana and Anthony Maiorana have no standing to assert their claims, but their claims should be dismissed for all the reasons I have heretofore advanced.

I want to mention very briefly that I assume that some form of judgment will be submitted embodying this, and that should be done quickly.

I think it is probably not appropriate at this point to get off the strict business and to get into any personal comments. I know it probably is cold comfort to Mr. Person for me to try to make any statement after I have dismissed his case, but I will say this, that the argument [illegible] the motions impressed me tremendously as far as the conduct of the lawyers and I have been concerned to some extent at different phases of the case with my belief that the claims of the plaintiffs were somewhat vague or there were new claims being advanced and so forth.

But I wish to say to Mr. Person that his oral argument represented, in my view, a simply massive effort. If you said you stayed up all night -- I didn't agree with you and dismissed your case -- but you did pull this together in a way no one else could have done any better and made your points and made them clearly and you delineated your arguments clearly, and the result was that even if we disagree I understood what I was dealing with clearly and I very much appreciate that.

MR. PERSON: I think that there may have been certain things that have been said --

THE COURT: I will do all the talking at this point, we can't have rounds of this.

Also, it goes without saying that I was greatly assisted by the massive amount of work that the lawyers did during the trial on the statistics and, of course, the lion's share was done by the Paul, Weiss firm, and I am immensely grateful and although I must say that I thought those specifications about the delays and all the other things that you gave me, Mr. Person, were very helpful.

I am just trying to say that this case has been a long one and we do have, I am sure -- we are all human beings and we have feelings beyond the strict business, and I want to express my appreciation to counsel for what they have done.

I would like to simply note, Mr. Person, that I would like very quickly to get organized on what to do with the other severed cases, and I think that I will try to have a conference and just get this organized and I think maybe we can do something in advance of those trials to get the type of material ready about the transactions and so forth, but I won't try to cover that.

You could, if you can, alert counsel in the severed cases that I am going to expect them to come in and I know that as soon as you get a little rest I would appreciate your trying to think through what you think your position will be on those other cases, and we will talk again about them.

MR. PERSON: I think basically the Ford Motor Company is next and maybe that could be easy for

U.S. DISTRICT COURT FILED DEC 16 1976 S.D. OF N.Y.

12-24-76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL AUTO BROKERS CORP., et al.,

Plaintiffs,

-against-

GENERAL MOTORS CORPORATION, et al.,

Defendants.

70 Civ. 5421A (TPG)

FINAL JUDGMENT

This action having duly come on for trial as against defendants General Motors Corporation (sued herein in its own right and as Midtown Chevrolet, Inc.), General Motors Acceptance Corporation, Frederic G. Donner (sued herein as Frederick G. Donner), James M. Roche (sued herein as James P. Roche), Bob Bain Chevrolet, Paul Batt Buick, Inc., Glen Campbell Chevrolet, Inc. Gillogly Chevrolet, Inc. (sued herein as Hamister-Gillogly Chevrolet, Inc.), Niagara Frontier Automobile Dealers Association, Inc., and Paragon Oldsmobile, Inc., before the Honorable Thomas P. Griesa, District Judge, and a jury; all other defendants previously having been severed or dismissed from the action; the Court previously having granted partial summary judgment dismissing certain counts of the complaint, or parts thereof, as against defendant General Motors Corporation; this action previously having been discontinued with prejudice and without costs by plaintiffs Courtesy Auto Brokers and Robert B. Heim; the Court having directed a verdict dismissing all remaining counts of and claims asserted in the complaint as against all remaining defendants; and the Court having expressly determined that there is no just reason for delay in entering judgment upon the complaint, as all other defendants either have been dismissed or severed from this action, it is

MICROFILM DEC 17 1976

ORDERED, ADJUDGED AND DECREED that:

1. The complaint in this action be and it hereby is dismissed on the merits and with prejudice as against defendants General Motors Corporation (sued herein in its own right and as Midtown Chevrolet, Inc.), General Motors Acceptance Corporation, Frederic G. Donner (sued herein as Frederick G. Donner), James M. Roche (sued herein as James P. Roche), Bob Bain Chevrolet, Paul Batt Buick, Inc., Glen Campbell Chevrolet, Inc., Gillogly Chevrolet, Inc. (sued herein as Hamister-Gillogly Chevrolet, Inc.) Niagara Frontier Automobile Dealers Association, Inc., and Paragon Oldsmobile, Inc.;

2. The defendants named in paragraph 1 of this judgment recover their costs and disbursements, to be taxed by the Clerk of this Court, against plaintiffs National Auto Brokers Corp., Frank Maiorana, Anthony Maiorana, General Auto Sales & Leasing Corporation (suing herein as General Auto Sales & Leasing Inc.), Dale Strimple (suing herein as Dale Strimpel), Alfred J. Young, Sr., Nabcor of East New York, Inc., and Ralph Ajello, as administrator of the Estate of E. Louis Jamele, a/k/a Louis E. Jamele, jointly and severally; and

3. The Clerk is directed to make entry of this final judgment in accordance with Rules 54(b) and 58 of the Federal Rules of Civil Procedure.

Thomas P. Griesa
U.S.D.J.

JUDGMENT ENTERED: 12/16/76

Raymond F. Burghardt
Clerk of the Court

Dated: December 15, 1976
New York, New York

A TRUE COPY
RAYMOND F. [illegible]

A 6400

1/4/77- Bill of Costs as taxed in the sum of $26,913.52, in favor of defendant General Motors Corp., as against National Auto Brokers Corp., et al, and added to the judgment.

Raymond F. Burghardt
CLERK

Plaintiffs' Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL AUTO BROKERS CORP., et al., Plaintiffs, -against- GENERAL MOTORS CORPORATION, et al., Defendants.	70 Civ. 5421A (TPG) NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that each of the plaintiffs (National Auto Brokers Corp., Frank Maiorana, Anthony Maiorana, General Auto Sales & Leasing, Inc., Dale Strimple, Nabcor of East New York, Inc., Alfred J. Young, Sr. and Ralph Ajello, as Administrator of the Estate of E. Louis Jamele) hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on December 16, 1976.

Dated: January 14, 1977

Carl E. Person

Attorney for the Plaintiffs
132 Nassau Street
New York, New York 10038

(212) 349-4616

TO: See Attached Lawyers' List.

Memorandum of Judge Griesa

A 6402

#704

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

NATIONAL AUTO BROKERS CORP., et al.,

Plaintiffs,

v.

GENERAL MOTORS CORPORATION, et al.,

Defendants.

- -X

70 Civ. 5421A

MEMORANDUM

GRIESA, J.

Both parties have moved to revise the Clerk's allowance of costs.

The items in question relate to

(1) The transcript at the trial, and at a preliminary evidentiary hearing;

(2) Deposition transcripts.

As to Item (1), expedited daily copy was ordered by defendants at a cost of $3.75 per page, or a total cost of $21,564. The Clerk allowed the cost of the preliminary hearing and trial transcripts at the regular rate of $1.65 per page, or a total of $10,242.90. Defendants seek an award of the entire $21,564.

As to Item (2), the Clerk awarded the cost of all deposition transcripts, in their entirety, where any portion of such depositions were used at the trial. The Clerk disallowed the cost of all deposition transcripts where no portion was actually used at the trial. The disallowance included depositions which were merely used at the preliminary hearing.

Regarding deposition transcripts, plaintiffs seek a further disallowance, contending that only the cost of those pages actually used at the trial should be allowed. Defendants contend that the Clerk's award was inadequate, and that the costs of all depositions necessarily taken in preparation for the preliminary hearing and the trial should be allowed, regardless of whether any portions were actually read at the trial.

I rule that daily copy at both the preliminary hearing and the trial was necessarily obtained and used in the case. See Electronic Specialty Co. v. International Controls Corp., 47 FRD 158, 161 (S.D.N.Y. 1969). In the instant case, I found almost constant need to refer to the transcript of both the preliminary hearing and the trial, for a variety of reasons. These reasons include, but are not limited to, the necessity for decision on defendants' motions to dismiss at the conclusion of plaintiffs' case, which motions were granted.

However, defense counsel ordered the daily copy on an expedited basis, which generally meant same-day service. The charge was the $3.75 per page, leading to the total cost of $21,564. The court reporters have a daily copy rate of $2.75 for next-day service. The cost of the preliminary hearing and trial transcripts on this basis would have been $16,173 instead of $21,564. The next-day service would have been sufficient to cover the necessities of the case, and I am allowing transcript costs on this basis. Thus I am allowing the amount of $5,930.10 over and above the $10,242.90 allowed by the Clerk.

As to the deposition transcripts, I reject the suggestion of plaintiffs that the cost award be limited to those pages actually read at the trial.

I have reviewed the list of depositions submitted in defendants' bill of costs. I have no doubt whatever that all of these depositions were necessarily taken in preparation for the trial. The costs requested by defendants are allowed in their entirety. The Clerk awarded $15,954.62. This award should be increased to $21,475.60.

So ordered.

Dated: New York, New York
April 11, 1977

Thomas P. Griesa
THOMAS P. GRIESA
U.S.D.J.